APPENDIX A

LIFE PARTNERS, INCORPORATED,
Plaintiff–Appellant,

v.

Theodore V. MORRISON, Jr.; Mark C. Christie, in their official capacities as Commissioners of the State Corporation Commission; Alfred W. Gross, in his official capacity as the Commissioner of Insurance; Judith Williams Jagdmann, in her official capacity as Commissioner of the State Corporation Commission, Defendants–Appellees,

Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, Intervenor–Appellee,

and

Clinton Miller, in his official capacity as Commissioner of the State Corporation Commission, Defendant.

National Association of Insurance Commissioners; North American Securities Administrators Association, Incorporated, Amici Supporting Appellees,

and

Viatical Settlement Professionals, Incorporated, Movant.

Life Partners, Incorporated,
Plaintiff–Appellee,

v.

Theodore V. Morrison, Jr.; Mark C. Christie, in their official capacities as Commissioners of the State Corporation Commission; Alfred W. Gross, in his official capacity as the Commissioner of Insurance; Judith Williams Jagdmann, in her official capacity as Commissioner of the State Corporation Commission, Defendants–Appellants,

and

Clinton Miller, in his official capacity as Commissioner of the State Corporation Commission, Defendant,

and

Robert F. McDonnell, in his official capacity as the Attorney General of the Commonwealth of Virginia, Intervenor–Defendant.

North American Securities Administrators Association, Incorporated; National Association of Insurance Commissioners, Amici Supporting Appellants,

and

Viatical Settlement Professionals, Incorporated, Movant.

Nos. 06–1370, 06–1371.

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 30, 2006.

Decided April 30, 2007.

ARGUED: Douglas Michael Palais, Leclair Ryan, P.C., Richmond, Virginia, for Appellant/Cross–Appellee. Maureen Riley Matsen, Office of the Attorney General of Virginia, Richmond, Virginia; Robert A. Dybing, Thompson & McMullan, Richmond, Virginia, for Appellees/Cross–Appellants. **ON BRIEF:** Cameron S. Matheson, Leclair Ryan, P.C., Richmond, Virginia; Lee E. Goodman, Robert P. Howard, Leclair Ryan, P.C., Washington, D.C., for Appellant/Cross–Appellee. Faisal S. Qureshi, Thompson & McMullan, Richmond, Virginia; Ronald N. Regnery, Office of the Attorney General of Virginia, Richmond, Virginia; Philip R. de Haas, William H. Chambliss, Pamela B. Beckner, Scott A. White, State Corporation Commission of Virginia, Richmond, Virginia, for Appellees/Cross–Appellants. Rex A. Staples, Stephen W. Hall, Lesley M. Walker, North American Securities Administrators Association, Inc., Washington, D.C., for North American Securities Administrators Association, Incorporated, Amicus Supporting Appellees/Cross–Appellants. Elizabeth Mason Horsley, Williams Mullen, P.C., Richmond, Virginia, for National Association of Insurance Commissioners, Amicus Supporting Appellees/Cross–Appellants.

Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge MICHAEL and Judge TRAXLER joined.

OPINION

NIEMEYER, Circuit Judge.

We decide, in this case of first impression, whether the Virginia Viatical Settlements Act, Va. Code Ann. § 38.2–6000, *et seq.*, which regulates viatical settlements with insureds who are residents of Virginia, is saved from the dormant Commerce Clause of the U.S. Constitution by the McCarran–Ferguson Act, 15 U.S.C. §§ 1011, 1012, as a state law that "relates to" the regulation of the business of insurance or as a state law enacted "for the purpose of regulating the business of insurance."

"Jane Doe," a terminally ill resident of Virginia with 6 to 18 months to live, sold her life insurance policy to Life Partners, Inc., a Texas corporation, at a deep discount to provide her with cash needed for the remaining months of her life. This transaction, known as a "viatical settlement," is purportedly regulated by Virginia to protect its residents who, in the vulnerable circumstances of being terminally ill, might find it necessary to sell their life insurance policies.

Following the transaction, Jane Doe sought to improve the sale price of her policy by invoking the minimum pricing provisions of the Virginia Viatical Settlements Act. Life Partners, contending that the Virginia Act violated the dormant Commerce Clause, commenced this action to declare the Act unconstitutional and to enjoin its enforcement. Virginia defended the Act as serving a legitimate and important local interest in regulating viatical settlements with its residents. Virginia also argued that, in any event, it properly acted pursuant to the commerce power conferred on it by the McCarran–Ferguson Act, which authorizes States to enact

laws relating to or for the purpose of regulating the business of insurance.

On cross-motions for summary judgment, the district court entered judgment for Virginia, holding that the Virginia Viatical Settlements Act did not violate the dormant Commerce Clause. Relying on the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), the district court concluded (1) that the Virginia Viatical Settlements Act did not discriminate against interstate commerce; (2) that the Act served a legitimate and important local purpose; and (3) that any burden on commerce was only incidental.

On appeals by both parties, we conclude that the sale of life insurance policies by terminally ill patients directly and substantially affects the business of insurance and that the Virginia Viatical Settlements Act "relates to" such business and was enacted "for the purpose of regulating" such business. The McCarran–Ferguson Act thus saves the Virginia Act from preemption of the Commerce Clause and renders it constitutional. Based on this conclusion, we affirm.

I

A "viaticum" in ancient Rome was a purse containing money and provisions for a journey. A viatical settlement, by which a dying person is able to acquire provisions for the remainder of his life's journey by selling his life insurance policy, is thus thought to provide a viaticum. In the language of the industry, the insured is the "viator," who sells his policy at a discount

to a "provider" of the viaticum. The viatical settlement provider is often backed by investors under arrangements reached between the provider and the investors. Once a viator sells a policy to a provider, the provider assumes the responsibility for paying the premiums and designates itself as the beneficiary of the policy. Upon the viator's death, the provider collects the face value of the policy, and the provider's profit is the difference between the face value of the policy and the amount paid to the viator, premiums paid to the insurance company, and the administrative expenses incurred. Because the sooner the viator dies the greater the provider's profit, a provider takes special care in calculating a viator's life expectancy by hiring an independent doctor to examine the insured and his medical records and by monitoring the viator's health until death.

The viatical settlements industry was born in the 1980s in response to the AIDS crisis. In the early years, AIDS was a rapidly fatal disease, and its victims usually died within months of diagnosis. Many AIDS sufferers were in great need of cash to pay for their care after they had become debilitated. Their life insurance policies were not only expensive to maintain but could, upon liquidation, provide some of the desperately needed cash. Moreover, investors were willing to purchase the life insurance policies of AIDS sufferers. Inasmuch as AIDS sufferers had predictably short life expectancies, their policies were reliable investments. *See generally*, Liza M. Ray, Comment, *The Viatical Settlement Industry: Betting on People's Lives is Certainly No "Ex-*

acta," 17 J. Contemp. Health L. & Policy 321, 321–22 (2000); Joy D. Kosiewicz, *Comment, Death for Sale: A Call to Regulate the Viatical Settlement Industry*, 48 Case W. Res. L. Rev. 701, 704 (1998).

The viatical settlements market expanded to include other terminal illnesses, especially as AIDS became a more treatable disease. People suffering from cancer, heart disease, Alzheimer's disease, and other progressive illnesses, as well as elderly people in need of funds for assisted living, found viatical settlements a useful source of immediate cash. Today, the industry is growing exponentially as investors seek out not only the terminally ill, but the swelling ranks of generally healthy, elderly Americans. It is estimated that $13 billion worth of life insurance policies were sold by policyholders to providers in 2005—up from $5 million in 1989 and $200 million in 1998—and it is projected that by 2030 the number could reach $160 billion. *See* Holman W. Jenkins, Jr., *Life Insurers Face the Future, Grudgingly*, Wall St. J., Aug. 9, 2006, at A11; Liam Pleven & Rachel Emma Silverman, *Investors Seek Profit in Strangers' Deaths*, Wall St. J., May 2, 2006, at C1; *see generally* Miriam R. Albert, *The Future of Death Futures: Why Viatical Settlements Must Be Classified as Securities*, 19 Pace L. Rev. 345, 353–55 (1999).

The need for regulating the business of viatical settlements became apparent from the beginning. The power imbalance between the viator and the provider creates a substantial potential for abuse. The viator is usually in a weakened physical condition, often facing im-

minent death, often in financial hardship due to medical and healthcare costs, and often ignorant of industry practices. The provider, on the other hand, has extensive resources, is usually backed by investors, and is armed with sophisticated industry knowledge. Moreover, because of his illness and lack of time and energy to "comparison shop" for the best payment, a viator often agrees to sell at a drastically reduced price, particularly when he fails to understand the nature and value of the rights that he has in the insurance policy that he is selling. The potential for harassment of the viator after the sale is also real, as the providers, acting under the terms of the viatical settlement, closely monitor the viator's health, subjecting him to regular medical examinations. In addition, the life insurance industry began to face new risks, including the increased risk of fraud, as potential insureds sought to hide their illnesses in order to obtain policies and thereafter to sell them to viatical settlement providers. Finally, many have questioned the ethics of an industry whose profits depend on, and whose investors hope for, the early death of its customers.

Because of the need to protect viators and to create a transparent and fair viatical settlements market, the National Association of Insurance Commissioners developed the Viatical Settlements Model Act in 1993 and Viatical Settlements Regulations in 1994 to guide States in their regulation of the viatical settlements industry. To date, approximately 38 States, including Virginia, have adopted a version of the Model Act or similar legislation.

The Virginia Viatical Settlements Act (sometimes hereafter the "Act") was enacted in 1997 to address Virginia's concern with the "potential for exploitation of vulnerable and seriously ill individuals." Legislative Summary, House Bill 871 (Va. 1997). The Commissioner of Insurance for the Bureau of Insurance of the Virginia State Corporation Commission, the state agency charged with implementing and enforcing the Act, stated that some of the Act's specific objectives and purposes include "ensuring that entities providing viatical settlement services are licensed, operated by persons of good character, and do not engage in illegal, unfair or unethical conduct" and "ensuring that fair compensation be paid to viators."

Thus, the core provisions of the Act ensure that providers are reliable; require full disclosures to viators; protect the privacy of viators; establish minimum prices for policies; and prohibit fraud.

More particularly, the Act requires that brokers (defined as viators' agents) and providers be licensed if they contract with a Virginia resident in connection with a viatical settlement. Va. Code Ann. §§ 38.2–6002, –6003. The Act provides that before issuing a license to a provider, the State Corporation Commission is required to investigate the applicant to ensure it is "competent and trustworthy," "indicates its intention to act in good faith within the confines of the license," "has a good business reputation," and "has provided an antifraud plan." *Id.* § 38.2–6002(D). The Act also requires providers to "be bonded" or submit to

"other mechanisms for financial accountability" adopted by the Commission. *Id.* § 38.2–6002(I).

The Act imposes extensive disclosure obligations on providers. For instance, providers must disclose to viators, among other things, the "possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy"; the tax consequences of selling the policy; the right of a viator to rescind a viatical settlement for 15 days after receipt of the proceeds; the fact that entering into a viatical settlement may cause a viator to forfeit rights and benefits under the policy; the fact that the provider may require medical visits as frequently as once a month to determine the viator's health status; and the possible loss of coverage for third parties if the life insurance policy involves family riders or includes coverage of a life other than the viator's. *See* Va. Code Ann. § 38.2–6007.

Section 38.2–6005 of the Act is devoted to the protection of a viator's privacy and the confidentiality of information about the viator. *See also* Va. Code Ann. § 38.2–6008(A)(1)(b), (B), (F).

The Act requires providers to pay a viator a minimum percentage of the face value of the insurance policy sold, depending upon the viator's life expectancy. Thus, if the viator's life expectancy is less than 6 months, he must be paid a minimum of 80% of the policy's face value; if his life expectancy is at least 6 but less than 12 months, then he must be paid at

least 70% of the policy's face value; if his life expectancy is at least 12 but less than 18 months, he must be paid at least 65% of the policy's face value; and if his life expectancy is at least 18 but less than 25 months, he must be paid at least 60% of the policy's face value. *See* 14 Va. Admin. Code § 5–71–60(A) (2006).

And the Act contains several provisions prohibiting false or misleading advertising, Va. Code Ann. § 38.2–6010; prohibiting fraud in connection with viatical settlements, *id.* § 38.2–6011; and making violations of the Act unfair trade practices, *id.* § 38.2–6013.

Other miscellaneous provisions designed to protect Virginia viators are also included in the Act, such as a requirement that providers submit to the Commission all viatical settlement contracts for review and approval before closing. Va. Code Ann. § 38.2–6003(A). Funds must be paid to the viator within three business days after the viatical settlement provider has received the insurer's acknowledgment that the beneficiary of the life insurance policy has been changed. *Id.* § 38.2–6007(A)(6). Before entering into a viatical settlement contract, a provider must obtain "a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract." *Id.* § 38.2–6008(A)(1)(a).

Finally, we note that the Act does not regulate the relationship between viatical settlement providers and their investors, a relation-

ship that is most often regulated by securities laws. *See* Va. Code Ann. § 38.2–6016.

II

"Jane Doe," a resident of Martinsville, Virginia, who was terminally ill with AIDS, began in March 2004 to explore ways to liquidate her life insurance policy. Her policy had a face value of $115,000 and contained no accelerated death benefit of any value.

Researching on the Internet, Doe located two brokers—Ideal Settlements, Inc., located in New Jersey, and Individual Benefits, Inc., located in North Carolina—and signed brokerage contracts with both. Ultimately, however, she chose Ideal Settlements to negotiate on her behalf. Ideal Settlements contacted Life Partners, located in Waco, Texas, inviting a bid for Doe's life insurance policy.

Life Partners engages nationally in the business of viatical settlements. It locates investors to provide the money, and it negotiates with viators or their brokers for the purchase of life insurance policies. Its profits and those of the investors are determined by the difference between (1) the face amount of the policy paid upon the viator's death and (2) the cost of the policy, the cost of paying premiums until death, and administrative expenses. While Life Partners is licensed as a viatical settlement provider under Texas law, it is not so licensed in Virginia.

Life Partners hired an independent physician to assess Jane Doe's medical condition, and the physician determined that Doe had a life expectancy of 6 to 18 months. Life Part-

ners also located 12 investors from 7 States—none from Virginia—who, acting as a group, were interested in bidding on Doe's policy. On behalf of these purchasers, Life Partners submitted a bid to Ideal Settlements in the amount of $26,000. When Doe rejected that offer, Life Partners raised the bid to $27,000, which Doe also rejected. Life Partners then submitted a final bid of $29,900 which Doe accepted. The bid represented 26% of the face value of Jane Doe's policy.

Life Partners sent the necessary forms, disclosures, and other information required by Texas law to Doe for her review and signature. Doe completed the forms and executed the viatical settlement, returning them to Life Partners for final review and execution in Texas. Life Partners closed the transaction in Texas on May 13, 2004, and wired $29,900 to Doe in Virginia.

Five months later, on October 11, 2004, Doe contacted Life Partners demanding that it pay her more money, based on the Virginia Viatical Settlements Act. That Act would have required Life Partners to pay Doe at least $69,000, and maybe more, depending on the applicable range of life expectancy. Life Partners refused her demand but offered to rescind the transaction, even though the period for rescission had expired. Doe refused rescission and instead filed a complaint with the Virginia Bureau of Insurance, the relevant enforcement arm of the State Corporation Commission.

The Bureau of Insurance conducted an inquiry and concluded that Life Partners had

acted as an unlicensed viatical settlement provider with a Virginia resident. At the request of the Bureau of Insurance, the Virginia State Corporation Commission issued a "rule to show cause" against Life Partners, requiring it to explain why it was conducting business with a Virginia resident without proper licensing, in violation of Virginia law. It also warned Life Partners that unless it subjected itself to Virginia's regulatory regime, Life Partners would be barred from making any further purchases from Virginia residents, under threat of prosecution for a "knowing and willful violation of the law."

On May 26, 2005, Life Partners commenced this action under 42 U.S.C. § 1983, asserting that the State Corporation Commission and the Bureau of Insurance (herein jointly, "Virginia" or the "Commission") violated the dormant Commerce Clause of the United States Constitution by attempting to enforce the Virginia Viatical Settlements Act against Life Partners. Life Partners' dormant Commerce Clause challenge was particularly grounded on the jurisdictional provision of the Virginia Act which gave the Commission oversight authority over all viatical settlements involving Virginia viators. Life Partners contended that this scope of jurisdiction rendered Virginia's regulatory control so broad that it affected commerce occurring wholly outside of Virginia. It also argued that Virginia's regulatory regime, in particular the licensing requirement and price controls, discriminated against and burdened interstate commerce.

Life Partners filed a motion for summary judgment based on its dormant Commerce Clause challenge, and the Commission filed a cross-motion for summary judgment, contending that it had an important and legitimate interest in regulating viatical settlements and that its law had only incidental effects on commerce. The Commission also argued that Congress had explicitly authorized state regulation of viatical settlements in the McCarran–Ferguson Act, a statute that delegates to the States Congress' commerce power to regulate the insurance industry.

The district court granted the Commission's motion for summary judgment and denied Life Partners' motion, agreeing with the Commission that the Act did not violate the dormant Commerce Clause. The court conducted a full Commerce Clause analysis, concluding that Virginia's regulation of viatical settlements comfortably survived the scrutiny. The district court declined to reach the Commission's argument that Congress had authorized States to regulate viatical settlements with the McCarran–Ferguson Act.

These cross-appeals followed. Life Partners challenges the district court's holding that the Virginia Act does not violate the dormant Commerce Clause, and the Commission challenges the district court's failure to address its argument based on the McCarran–Ferguson Act. The Commission contends also that the district court should have abstained in favor of Commission proceedings, under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

III

Because we conclude that in the McCarran–Ferguson Act, Congress delegated its commerce power to Virginia in sufficiently broad terms to cover viatical settlements, thereby saving the Virginia Viatical Settlements Act from any dormant Commerce Clause challenge, we need not decide whether, in the absence of such delegation, the Act would violate the dormant Commerce Clause.

Through the McCarran–Ferguson Act or any other act, Congress holds the authority to "redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *see also Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause"). Thus, if the McCarran–Ferguson Act authorizes the States to regulate viatical settlements, the issue of whether the Virginia Viatical Settlements Act burdens interstate commerce becomes irrelevant. We therefore address whether the Virginia Act falls within the scope of the McCarran–Ferguson Act.

The McCarran–Ferguson Act was passed in 1945 in reaction to the Supreme Court's decision in *United States v. South–Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88

L.Ed. 1440 (1944). Prior to that decision, it had been understood that "[i]ssuing a policy of insurance [was] not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868). Consequently, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978). Before *South-Eastern Underwriters*, the States regulated the insurance business free from any concerns arising under the dormant Commerce Clause, and federal statutes, such as the Sherman Act, were thought to be inapplicable to the insurance industry. *See SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 457–58, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969). In *South-Eastern Underwriters*, the Supreme Court altered this understanding by holding that the business of insurance was a part of interstate commerce and therefore subject to the Commerce Clause and federal enactments based on the Commerce Clause, such as the Sherman Act. *South-Eastern Underwriters*, 322 U.S. at 552–53, 64 S.Ct. 1162.

Congress reacted by enacting the McCarran--Ferguson Act the very next year. Making its mission unmistakably clear, Congress declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Shortly thereafter, the Supreme Court stated, "obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.*

v. Benjamin, 328 U.S. 408, 429, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946). The McCarran–Ferguson Act achieved this purpose "by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised," and "by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.* at 430, 66 S.Ct. 1142.

To understand the McCarran–Ferguson Act as it might apply in this case, we start with "the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979).

The substantive portions of the McCarran–Ferguson Act are found in its first two sections. The first provides:

> The Congress hereby declares that *the continued regulation and taxation by the several States of the business of insurance is in the public interest*, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added). And the second provides:

> (a) State regulation. The business of insurance, and every person engaged therein, shall be subject to *the laws of the several States which relate to the regulation or taxation of such business.*

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede *any law enacted by any State for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That [the federal antitrust laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012 (emphasis added). Section 1011 thus declares that the "business of insurance" continues to be subject to regulation by the States, as had been the case before *South-Eastern Underwriters*. Section 1012(a) then confers the federal commerce power on the States to enact laws which "relate" to the regulation of the business of insurance, and § 1012(b) restricts federal authority so that no federal law can be construed to "invalidate, impair, or supersede" any state law enacted "for the purpose of" regulating the business of insurance—unless the federal law does so explicitly. By so restricting federal authority, § 1012(b) also defines the scope of state authority, implicitly authorizing States to enact laws "for the purpose of" regulating the business of insurance. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993) (explaining that § 1012(b) "was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance").

In short, the McCarran–Ferguson Act "declares" that regulation of the business of insurance belongs with the States, and to implement that declaration, the Act explicitly protects from a dormant Commerce Clause challenge (1) any state law that "*relates* to the regulation of the business of insurance" or (2) any state law "enacted *for the purpose* of regulating the business of insurance." The Act reserves from its operation only the federal antitrust laws. 15 U.S.C. § 1012(b).

Important to a proper application of these provisions is an understanding of the terms (1) "insurance," (2) the "business of insurance," (3) the nature of laws that "relate to" or are enacted "for the purpose of" regulating the business of insurance, and (4) the historical context in which Congress enacted the McCarran–Ferguson Act.

A contract of insurance is one by which an insured transfers risks to an insurer for the payment of a premium. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 130, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). And so, under a life insurance policy, the insured purchases a hedge against his early death by the insurer's commitment to pay the face amount of the policy. Because the insurer must pay the insured's beneficiary even upon an early death, the insurer takes the bet that the insured will not die before the premiums and investment income accumulate to exceed the face amount of the policy. The cost of the insured's risk, represented by the amount of premiums, is calculated so as to match the anticipated pre-

mium amount with the anticipated payout plus a profit.

Thus, both parties to an insurance contract have a large array of factors to consider in determining whether to enter into a contract of insurance. The insurer considers, among other things, the insured's age and life expectancy, health, work, healthcare and life habits, family history, and similar data from its relevant pool of insureds. The insurer also considers the market for the investment of premiums, data from the pool of insureds relating to the lapsing and early surrender of policies, and marketing, selling, and administrative expenses. The insured, on the other hand, considers, among other things, the insurer's financial strength, its history of honoring policies, its investment record, the risk represented by the relevant pool of insureds, and the insurer's service. But in the end, *both parties* enter into the contract of insurance with the hope that the insured will not die early. That hope is reflected in the insurer's acceptance of the bet that the insured will not die before premiums and investment income at least equal the face amount of the policy, and that hope is inherent in the insured's will to live as part of human nature.

The "business of insurance" refers to the marketing, selling, entering into, managing, servicing, and performing of insurance contracts. *See National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (explaining that in the McCarran–Ferguson Act, "Congress was concerned with the type of state regulation that centers around the contract of insurance," in-

cluding "the type of policy which could be issued, its reliability, interpretation, and enforcement"). Thus, "[t]he relationship between insurer and insured," which is the heart of the insurance contract, is also at "the core of the business of insurance." *See id.* ("Whatever the exact scope of the statutory term ['business of insurance'], it is clear where the focus was—it was on the relationship between the insurance company and the policyholder"). In applying these principles, the Supreme Court has distinguished state statutes that regulate the merger of insurance companies, which are aimed at "the relationship between a stockholder and the company in which he owns stock," from statutes that directly affect contracts of insurance, their risks, and their performance. *See National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (explaining that even though the state merger statute only applied to insurance companies, "[t]he crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies"). Thus, at bottom, any understanding of the scope of what amounts to the business of insurance must be based on the "commonsense understanding" of whether the business relates to or affects "the risk pooling arrangement between the insurer and insured." *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341–42, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003) (examining the scope of the business of insurance in determining whether, under ERISA, a state law regulates insurance);

see also Pireno, 458 U.S. at 129, 102 S.Ct. 3002.

Finally, we understand that the McCarran–Ferguson Act confers more commerce power to the States than is necessary simply to regulate the business of insurance directly. The grant of power sweeps more broadly, giving States the power to enact laws that "relate to" the regulation of the business of insurance or are enacted "for the purpose of" regulating the business of insurance. *See Fabe*, 508 U.S. at 504, 113 S.Ct. 2202 ("The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that ... necessarily encompass[ ] more than just the 'business of insurance'"). This grant of power to the States was deliberately broad "to allay fears" about the "widely perceived ... threat to state power" that followed the Supreme Court's decision in *South–Eastern Underwriters*. *See Fabe*, 508 U.S. at 499–500, 113 S.Ct. 2202; *see also Prudential Ins. v. Benjamin*, 328 U.S. 408, 429–30, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

IV

With this understanding of the McCarran–Ferguson Act, we now turn to address whether the Virginia Viatical Settlements Act is protected from a dormant Commerce Clause challenge as a state law that *relates to* or was enacted *for the purpose of* regulating the business of insurance.

While obvious, it must first be stated that the subject of every viatical settlement is an insurance policy. Moreover, the viatical settlement is not collateral to the policy. Rather,

it modifies it, changing the parties' obligations and benefits, while yet leaving the insurance—i.e., the transfer of the specified risk—in place. At its essence, a viatical settlement is a transaction that fractures the two-part insurance contract between the insurer and the insured and creates a new tripartite arrangement (albeit not a three-party agreement) among the insurer, the insured, and the insured's assignee—the viatical settlement provider. Because of this new tripartite arrangement, each party has, with respect to the preexisting insurance contract, new or different obligations and benefits.

The insurer is faced with the newly divided obligations reflected in the interests of the insured and the viatical settlement provider. While the insured gives up her financial interest in the insurance contract, her life and the risk of her death remain the subject of the insurance contract. But now, the insurer, instead of carrying its obligation to pay on the insurance contract with an insured "who guards against possible loss and disaster to [her] as an individual," *see* 1 Appleman on Insurance § 1 (2d ed. 2006) (defining life insurance), carries its obligation with a viatical settlement provider, who hopes, for financial reasons, for the early death of the insured. The insurer must also now keep track administratively of both the insured, whose life remains essential to the arrangement, and the viatical provider, who now must pay the insurer the premiums. Moreover, the fact that a new contract—the viatical settlement—introduces a new interested party to the ar-

rangement raises the possibility that the insurer can become involved in legal disputes between the insured and the viatical provider.

The insurer is also faced with changed economic risks that were not factored into its calculation of premiums. Under the two-party arrangement that preexisted the viatical settlement, the insured was in a class of persons that statistically surrendered a portion of its policies or let a portion of them lapse. Insurance companies rely on these surrender and lapse rates to calculate premiums to charge for life insurance policies. The viatical provider distorts these rates, however, because it will always hold onto the policy until the insured dies in order to protect its investment. Thus, as the initial actuarial risk is distorted with each new viatical settlement, the risk-spreading profile of the insurer becomes less reflective of its initial calculations.

The insured too faces changed obligations and risks. Fundamentally, instead of relating to the insurer as an insured whose own life is the subject of financial benefits that she controls, she now relates as an insured whose death is meaningful only to financial investors. Also, while she likely subjected herself to a health examination by the insurer when she initially purchased the life insurance policy, under the tripartite arrangement with a viatical provider, she must subject herself to routine, periodic medical examinations—perhaps even monthly. She also might have unwittingly given up rights provided by her insurance policy that could have generated cash through loans or cash surrender value because

she lacked adequate knowledge and information about the value of those rights. Finally, the insured is subjected to additional privacy concerns relating to her medical records and financial information. While generally these are already regulated to some degree, certain private financial and health matters nonetheless could legally become public as a result of a viatical settlement.

Not only are the parties to insurance contracts affected by viatical settlements, but the State too has interests, especially in ensuring (1) that its residents not be subjected to unscrupulous conduct by the viatical settlement providers who might defraud, harass, or abuse insureds in the State and (2) that its residents not defraud insurance companies in an effort to realize a quick financial return by entering into insurance contracts while hiding the fact that they will soon, within a determinable time, die.

Virginia addressed these concerns in the Virginia Viatical Settlements Act, recognizing that each party to the new tripartite arrangement has interests meriting attention and protection. The insured's privacy rights are addressed in Virginia Code § 38.2–6005; the insured's potential lack of information and knowledge about her policy and what she loses in a viatical settlement are addressed by mandating disclosures, *id.* § 38.2–6007. A requirement that the insured be of sound mind when entering into a viatical settlement is imposed in § 38.2–6008(A)(1). Section 38.2–6008 also regulates the practices of viatical settlement providers and § 38.2–6011 prohibits un-

fair advertising with respect to viatical settlements. The insurers are protected by being provided in advance with applications of their insureds for viatical settlements and the insured's medical records to allow the insurers to conduct fraud investigations. *See id.* § 38.2–6008(A)(3), (4). The Act requires viatical settlement providers to submit to the Commission for review and approval all viatical settlement contracts before closing, *see id.* § 38.2–6003, and they must pay viators (within three days of the change of beneficiary) a minimum percentage of the face value of the life insurance policy, *see* 14 Va. Admin. Code § 5–71–60. Finally, the Act requires that any viatical settlement provider dealing with Virginia citizens have a plan of operation, be competent and trustworthy, indicate an intention to act in good faith and in compliance with state licensing requirements, have a good business reputation, and be present within the State for purposes of regulation and enforcement. *See* Va. Code Ann. § 38.2–6002.

All of these matters, and more, regulated by the Virginia Viatical Settlements Act surely "relate to" the business of insurance in that they regulate the new ordering of the tripartite insurance arrangement involving the insurer, the insured, and the viatical settlement provider. *See* 15 U.S.C. § 1012(b). The term "relate to" as used in the McCarran–Ferguson Act is parallel to the same language used in the preemption provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), as both words define the scope of preemption. In ERISA, Congress preempted "any

and all State laws" that "*relate* to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). And of course, the McCarran–Ferguson Act narrows the preemption of the Commerce Clause by conferring commerce power to the States to enact laws that "relate to" the regulation of the business of insurance.

The Supreme Court has described ERISA's "relate to" language as "clearly expansive." *See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Hoping to focus judicial analysis, the Court commented that a state "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (emphasis added). But even these terms, if "taken to extend to the furthest stretch of [their] indeterminacy," would have preemption "never run its course." *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671. Faced with such expansive language capable of swallowing, by its own terms, much more than Congress intended, the Court surrendered: "We simply must go beyond the unhelpful text and the frustrating difficulty in defining its key term ['relate to'], and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656, 115 S.Ct. 1671.

Interpreting the "relate to" language in § 1012(a) of the McCarran–Ferguson Act, we

may similarly say that it is "clearly expansive" and that a state law that has a "connection with" or "reference to" the regulation of the business of insurance is saved from the Commerce Clause's preemption. But these terms too prove to be somewhat indeterminate in the context of the McCarran–Ferguson Act. Therefore, we likewise look "to the objectives of the [McCarran–Ferguson Act] as a guide to the scope of the state law that Congress understood would" be immune from dormant Commerce Clause attack. *See Travelers*, 514 U.S. at 656, 115 S.Ct. 1671.

Congress made its objectives in passing the McCarran–Ferguson Act clear by declaring "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. By passing the McCarran–Ferguson Act, Congress "put the full weight of its power behind existing and future state legislation" that relates to the business of insurance "to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it." *Prudential Ins.*, 328 U.S. at 431, 66 S.Ct. 1142. It was "Congress' purpose ... to give support to the existing and future state systems for regulating and taxing the business of insurance." *Id.* at 429, 66 S.Ct. 1142.

Thus, focusing on the business of insurance insofar as it involves the marketing, sale, execution, performance, and administration of insurance contracts, Congress gave States broad authority to regulate, and we conclude that because the Virginia Viatical Settlements Act

addresses these aspects of insurance contracts with Virginia residents, the Act "relates to" the regulation of the business of insurance.

The Virginia Viatical Settlements Act was also enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S. at 505, 113 S.Ct. 2202 (citation omitted). Just as the Virginia statute relates to the business of insurance, it also clearly "manages" and "controls" the relationship between the insurer and the insured and is "aimed at protecting or regulating" that relationship, as it dictates in what manner an insured may alter fundamental aspects of her relationship with the insurer.

Our holding that the Virginia Act was passed "for the purpose" of regulating the insurance business is bolstered by a comparison to the Supreme Court's holding in *National Securities*, where the Securities and Exchange Commission sought to rescind the merger of two Arizona insurance companies based on material misstatements made in violation of federal law during the merger process. 393 U.S. at 462–63, 89 S.Ct. 564. Arizona argued that under the McCarran–Ferguson Act, its merger law should govern the transaction. In holding that federal law governed, the Supreme Court noted that the state law was focused on protecting the insurance company's *stockholders* rather than "attempting to secure the interests

of *those purchasing insurance policies*," distinguishing regulations involving stockholders from regulations involving insurance policyholders. *Id.* at 460, 89 S.Ct. 564 (emphasis added). *National Securities* thus would control here *if* the Virginia Viatical Settlements Act purported to regulate the relationship between viatical settlement providers *and their investors*—the so-called "securities" side of the viatical settlements business. But the Virginia Viatical Settlements Act regulates only the "insurance" side of the transaction—involving the providers' purchase of life insurance policies from viators—with the clear purpose of securing the interests of those originally purchasing the policies by mandating that they receive a fair price from licensed providers for the policies that become the subject of viatical settlements. Indeed, the Virginia Act states that it does not apply to the securities side of the viatical settlements business. *See* Va. Code Ann. § 38.2–6016.

Consistently, in *Fabe*, the Supreme Court upheld under the McCarran–Ferguson Act a state-created bankruptcy priority favoring insurance policyholders in bankruptcy proceedings because the state law carried out "the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." 508 U.S. at 504, 113 S.Ct. 2202. Thus, if a statute assigning priority in an insurance company's bankruptcy proceedings is passed "for the purpose of regulating the business of insurance," as the Supreme Court held in *Fabe*, then surely a statute regulating the

transferability of life insurance policies is also passed for the purpose of regulating the business of insurance.

Indeed, in this case, we need not even rely on the full breadth of the McCarran–Ferguson Act, which protects any law that "relates to" the regulation of the insurance business or was enacted "for the purpose of" regulating such business. We can rely on the McCarran–Ferguson Act's core protection of laws that *actually regulate* the "business of insurance." The subject matter of the Virginia Viatical Settlements Act is life insurance policies issued to Virginia residents—policies that are altered by viatical settlements. As already noted above, the insured, whose life remains the insurable interest, is given new duties and has reduced rights under the policy. By introducing a third party to the transaction whose interests are different from those of the original insured, the effect of the insured's policy on the insurer's risk pool changes.

Most importantly, however, the Virginia Viatical Settlements Act regulates directly the conduct and relationships of those traditionally engaged in the insurance business—insurers and insureds. The insurers on such contracts must be given information about every viatical settlement before the settlement is entered into. *See* Va. Code § 38.2–6008(A)(3). Moreover, in connection with every such viatical settlement, the insurer is required to respond to a request for verification of coverage within a specified time or to "indicate whether, based on the medical evidence and documents provided, [it] intends to pursue an investigation

regarding possible fraud or the validity of the insurance contract." *Id.* § 38.2–6008(A)(4). In addition, insurers are, under the Act, prohibited themselves from being viatical settlement providers. *Id.* § 38.2–6002(F). Of course, the insureds involved in viatical settlements are the principal subjects of the Virginia Viatical Settlements Act, for the Act is devoted mostly to giving them rights when they sell their financial rights in insurance contracts.

These direct regulations focused on selling insurance policies and the altering of insurance contracts surely satisfy the factors listed in *Pireno*. *See Pireno*, 458 U.S. at 129, 102 S.Ct. 3002 (directing courts to consider "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry"). Even as the Court in *Pireno* noted that none of the enumerated criteria was "necessarily determinative," *see id.*, the Court in *Kentucky Association of Health Plans*, considering the business of insurance in the context of ERISA, later chose to make a "clean break" from the *Pireno* factors insofar as they might be restrictive, relying on a "common-sense understanding" of whether the state law "substantially affect[ed] the risk-pooling arrangement between the insurer and the insured." *Ky. Ass'n of Health Plans*, 538 U.S. at 341, 123 S.Ct. 1471. Speaking in even broader terms, the Supreme Court has held that "[s]tatutes *aimed* at protecting or regulating [the] relationship [be-

tween insurer and insured], directly or indirectly, are laws regulating the 'business of insurance.'" *National Securities*, 393 U.S. at 460, 89 S.Ct. 564 (emphasis added).

In sum, we have little difficulty in concluding that the Virginia Viatical Settlements Act relates to the regulation of the business of insurance; was enacted for the purpose of regulating the business of insurance; and indeed regulates directly and substantially the actual business of insurance. Thus the McCarran–Ferguson Act saves the Act from any dormant Commerce Clause challenge.

Were there any residual doubt on this issue, Congress' treatment of viatical settlements under the Internal Revenue Code lays it to rest. In 1996, Congress amended the Internal Revenue Code to exclude from taxable income proceeds from the sale of a life insurance policy by a person who is terminally or chronically ill to a viatical settlement provider so long as the viatical settlement provider is "licensed ... *in the State* in which the insured resides." 26 U.S.C. § 101(g)(2)(B)(i)(I) (emphasis added). Moreover, if a State in which the insured resides does not provide for the licensing of viatical settlement providers, the insured still receives the tax benefit if the viatical settlement provider meets *both* "the requirements of sections 8 and 9 of the Viatical Settlements Model Act," *and* "the requirements of the Model Regulations ... relating to standards for evaluation of reasonable payments." 26 U.S.C. § 101(g)(2)(B)(ii)(I-II). Section 8 of the Model Act requires the viatical settlement provider to make extensive disclosures to the

viator, and § 9 regulates the settlement process and post-sale relationship between the provider and the viator. *Viatical Settlements Model Act* §§ 8–9 (Nat'l Ass'n of Ins. Comm'rs 2006).

Thus, in amending the Tax Code in 1996, Congress did far more than just extend significant tax benefits to viators in § 101(g)(2). It made those tax benefits *contingent* upon the viatical settlement provider's compliance with *state* licensing requirements, and when the insured's State did not require licensing, they were contingent upon compliance with numerous safeguards found in the Model Act and regulations, including the minimum prices for policies. This incorporation of state regulation shows Congress' concern with the pitfalls of an unregulated viatical market. It also reveals congressional trust in state regulatory measures to address these pitfalls. Most importantly, the contingency shows that Congress was aware of existing state regulation in the area and that it intended that the viatical settlement industry be regulated at the state, not federal, level.

In addition, § 101(g)(2) of the Tax Code requires not only that the viatical settlement provider be licensed, but also that it be licensed "in the State in which the insured resides." 26 U.S.C. § 101(g)(2)(B)(i)(I). This requirement contemplates a multi-state licensure regime. And it too encourages each State to pass viatical settlement laws because, if a State does not, its citizens may not receive the tax benefit, as the State cannot guarantee that providers will comply with the Model Act.

In short, in order to ensure that their citizens enjoy the tax benefit found in § 101(g)(2), States *must* enact licensing requirements. And the Virginia Viatical Settlements Act implements the very licensing regime Congress relied upon to confer tax benefits to viators under § 101(g)(2).

Life Partners relies heavily on *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), to argue that viatical settlements are not part of the business of insurance which is subject, by virtue of the McCarran–Ferguson Act, to state regulation. In *Life Partners*, the Securities and Exchange Commission was attempting to exercise regulatory jurisdiction over the securities' side of a viatical settlement transaction, in which the provider sells interest in the purchased policy or policies *to investors*. 87 F.3d at 540–42. The D.C. Circuit held that the investment side of the viatical transaction is not part of the business of insurance under the McCarran–Ferguson Act. *Id.* at 541–42. But that holding has no application to this case, which deals with Virginia's efforts to regulate the insurance side of the viatical transaction—the transaction by which the policyholder sells its policy to a settlement provider. Life Partners' argument fails to distinguish the two different aspects of the viatical settlement business—the one involving the viatical settlement provider's transaction *with an insured* to purchase a policy of life insurance and the other involving the relationship between the viatical provider *and its investors* to raise money for purchasing the insurance policies. In failing to make that distinction, Life Partners also ig-

nores the Supreme Court's holding in *National Securities*, 393 U.S. at 460, 89 S.Ct. 564.

V

In its cross-appeal, the Commission argues that the district court should have "abstained from exercising jurisdiction over this case out of respect for the important State interests implicated in regulating viatical settlements by Virginia citizens," citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Younger abstention is a doctrine requiring federal courts to refrain from interfering with ongoing state judicial proceedings that implicate important state interests. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). When the federal case, however, involves "an overwhelming federal interest—an interest that is ... a core attribute of the national government ...—no state interest, for abstention purposes, can be nearly as strong at the same time." *Harper v. Public Serv. Comm'n*, 396 F.3d 348, 356 (4th Cir. 2005).

This case involves just such an interest, the commerce power. Thus, the issue in this case is not whether Virginia has an interest in regulating viatical settlements—it most certainly does—but whether Congress authorized Virginia to do so, and if not, whether Virginia's regulations violate the dormant Commerce Clause. In such cases, "the commerce power itself justifies a narrower view of state inter-

ests in the abstention context." *Harper*, 396 F.3d at 357.

Under these principles, we conclude that the district court did not abuse its discretion in declining to abstain under *Younger v. Harris*.

For the reasons given herein, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

LIFE PARTNERS, INC., Plaintiff,

v.

Clinton MILLER, et al., Defendants,

and

Robert McDonnell, in his official capacity as Attorney General of the Commonwealth of Virginia, Intervenor.

No. CIV.A. 305CV368–HEH.

United States District Court,
E.D. Virginia,
Richmond Division.

March 10, 2006.

MEMORANDUM OPINION

HUDSON, District Judge.

(Denying Plaintiff's Motion for Summary Judgment and Granting the Motions for Summary Judgment Filed by the Defendants and the Intervenor)

In this suit for declaratory judgment, Plaintiff challenges the constitutionality of the Virginia Viatical Settlements Act as violative of the dormant Commerce Clause of the United States Constitution. The matter is before the Court on individual motions for summary judgment filed by each of the parties, along with memoranda in support and in opposition

of the respective motions. The Court heard oral argument on February 27, 2006.

The Virginia Viatical Settlements Act ("the Act"), codified as Section 38.2–6000, Code of Virginia, 1950 as amended, regulates the sale of life insurance policies by terminally-ill persons to third parties for less than the full amount of death benefits provided under the policy. The Act defines terminally ill as "having an illness or sickness that can reasonably be expected to result in death in 24 months or less." The Act establishes elaborate regulatory measures governing viatical settlement agreements. The accompanying regulations set forth a specific minimum pricing schedule for such agreements. The focus of Plaintiff's challenge is the jurisdictional provisions of the regulatory scheme, including oversight by the Virginia Bureau of Insurance triggered solely by the legal residence of the viator. Plaintiff contends that the scope of Virginia's regulatory control is sufficiently broad to effect commerce occurring wholly outside the geographic boundaries of the Commonwealth of Virginia. Plaintiff further maintains that the price controls and regulatory scheme are inspired by economic protectionism and has the effect of discriminating against and discouraging interstate commerce.

Because aspects of this Court's dormant Commerce Clause analysis turn on the intrastate elements of the transaction giving rise to this controversy, a thorough recital of the underlying facts is critical. There appears to be no material facts in dispute.

The Court's findings of fact are mined from the statements of undisputed facts contained in each party's Memorandum in Support of Motion for Summary Judgment. A close examination of those statements reveal the following factual premise. The opinions of defense experts are considered separately.

I. Background

The viator, Jane Doe ("Ms. Doe"),[1] was a resident of Martinsville, Virginia, and a client of Life Partners, Incorporated ("LPI"). There is no dispute that Ms. Doe met the statutory definition of a terminally-ill patient under the Act. Ms. Doe had a life insurance policy with a value of $115,000 at death. For undisclosed reasons, Ms. Doe elected to sell her life insurance policy, presumably to generate cash.

In order to market her policy, Ms. Doe contacted Ideal Settlement, Inc. ("Ideal"), a New Jersey corporation, through the internet. On March 16, 2004, Ms. Doe entered into an agreement ("the Agreement") with Ideal to market her policy. Under the terms of the Agreement, Ideal was engaged to serve as a broker and obtain bids for the purchase of Ms. Doe's policy. It appears to be undisputed that Ms. Doe never left the Commonwealth of Virginia, so presumably, the Agreement was arranged and negotiated by telephone. In order to locate an interested buyer, Ideal contacted the plaintiff, LPI.

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[1] Jane Doe is a pseudonym used by the Court to protect the identity of the viator.

LPI is a Texas corporation with its sole office in Waco and is a licensed viatical settlement provider under Texas law. LPI describes itself as an agent that represents purchasers in viatical transactions, but is not a broker. LPI is neither licensed in Virginia nor does business in the state. LPI markets their services nationally. The evidence is unclear whether LPI has purchased other insurance policies from Virginia residents.

At the invitation of Ideal, LPI assembled a consortium of twelve (12) interested persons located in seven (7) states, who were interested in purchasing Ms. Doe's policy as a group. None of the twelve (12) members of the investment group resided in the Commonwealth of Virginia. In negotiating the viatical settlement at issue in this case, LPI contacted Ms. Doe in Virginia at least twice by telephone. LPI submitted three (3) bids, or sales proposals, to Ms. Doe with progressively increasing sales prices. The Agreement was sent by LPI from Texas to Ms. Doe in Virginia by FedEx. By its terms, Ms. Doe sold her $115,000 life insurance policy to the investment group for $29,900. The Agreement specified that "this agreement was entered into in the State of Texas and its validity, construction, interpretation and legal effects should be governed by the laws and judicial decisions of that State . . . ." (See Agreement at Section 7.11.) The Agreement further provided "that the transaction is governed by and subject to the rules and regulations governing viatical settlements under the Texas Insurance Code". (See Agreement at Section 7.12.) Ms. Doe executed the

Agreement in Virginia and returned it to LPI in Texas, where it was countersigned by a corporate officer of LPI.

Subsequent to executing the Agreement, Ms. Doe contacted LPI and demanded payment of the minimum price prescribed by Virginia law for her insurance policy, which would have been $69,000 under the Virginia regulations. LPI declined, citing the provisions of the Agreement designating Texas law as controlling. Ms. Doe then filed a complaint with the Virginia Bureau of Insurance ("VBI"). After conducting a inquiry, the VBI concluded that LPI may need to obtain a Virginia license before transacting business in viatical settlements with a resident of the Commonwealth of Virginia. At the request of the VBI, the Virginia State Corporation Commission ("SCC") issued a rule to show cause against LPI requiring it to explain why it was conducting business without proper registration in violation of Section 38.2–6,000, *et seq*. This lawsuit followed.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). After the movant has met this burden, the nonmoving party must come forward with specific facts showing that evidence exists to

support its claims and that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of **material** fact. *See Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. "Rule 56(e) requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. Summary judgment is proper if after viewing all the evidence, including supplemental affidavits, in the light most favorable to the non-moving party, the Court finds no genuine issue exists. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

III. Standing

Before addressing the merits of the underlying action, the Court must first determine if the plaintiff has standing to contest the Act. Plaintiff has stated equivocally that its claim is limited to an as applied rather than a facial challenge.

Article III of the United States Constitution requires a plaintiff to demonstrate their standing by showing that they have suffered a judicially cognizable and redressible injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In order to demonstrate a cognizable

injury, the plaintiff must show that: (1) they have personally suffered an actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) the injury fairly can be traced to the challenged action; (3) the injury is likely to be redressed by a favorable decision from the Court. *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998) (citing *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130).

Assuming Plaintiff satisfies these constitutional requirements, they must also meet the requirements of prudential standing. *Id.* "Prudential considerations constitute a supplemental aspect of basic standing analysis and address concerns regarding the need for judicial restraint." *Oxford Assocs. v. Waste Sys. Auth.*, 271 F.3d 140, 145 (3rd Cir. 2001). "Prudential standing entails an inquiry into a plaintiff's role because 'the aim of this form of judicial self-governance is to determine whether the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' " *Id.* To satisfy prudential requirements, plaintiff's must assert their own legal rights and interests rather than those of a third party. Plaintiffs must also show that their interests fall arguably within the zone of interests that the statute, rule or constitutional provision in question protects or regulates. Finally, the court should refrain from adjudicating a " 'generalized grievance shared in substantially equal measure by all or a large class of citizens . . . .' " *Burke*, 139 F.3d at 405 (quoting *Warth*

v. Seldin, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

Assuming without deciding that the Act discriminates against interstate commerce, Plaintiff clearly has shown a concrete and redressible injury. Plaintiff's injury stems from the SCC's issuance of the rule to show cause. This puts Plaintiff in the dilemma of either complying with an arguably unconstitutional statute or facing administrative sanction. A favorable ruling by this Court, invalidating the underlying statute, would clearly redress Plaintiff's injury and presumably terminate the show cause proceedings. As a result, this Court is convinced that the plaintiff has constitutional standing to challenge the Act.

Plaintiff has also fulfilled the requirements of prudential standing. Enforcement of the Act would require the plaintiff to comply with all of its provisions. Therefore, Plaintiff's claim is not a generalized grievance, rather LPI has asserted its own individualized legal interest in assuring that it is not required to comply with an unconstitutional statutory provision. Furthermore, the plaintiff has alleged that the Act infringes on its right to engage in interstate commerce, and as a result, the claim falls squarely within the zone of interest the dormant Commerce Clause was designed to protect. As the United States Supreme Court has explained, Commerce Clause jurisprudence is designed to protect the states and "to benefit those who . . . are engaged in interstate commerce." *Dennis v. Higgins*, 498 U.S. 439, 450, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991). As a viatical provider, Plaintiff is engaged in inter-

state commerce and falls into the zone of interest protected by the dormant Commerce Clause. Accordingly, Plaintiff has demonstrated both constitutional and prudential standing to bring the present action.

IV. Analysis

A. The Commerce Clause

The Commerce Clause of the United States Constitution provides "Congress shall have Power . . . [to] regulate Commerce . . . among the several states." U.S. Const. Art. I, § 8, cl. 3. Congress's authority to regulate commerce pursuant to the Constitution inherently carries with it a prohibition to the states to refrain from enacting laws which impede the flow of interstate commerce. *See Cooley v. The Board of Wardens*, 53 U.S. 299, 318, 12 How. 299, 13 L.Ed. 996 (1851). This authority, known as the dormant Commerce Clause, "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.' " *Barclays Bank, PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994) (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). The dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Dennis*, 498 U.S. at 446, 111 S.Ct. 865. However, this limitation on state power "is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,'

even though interstate commerce may be affected." *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 355 (4th Cir. 2002) (quoting *Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 36, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980)).

Review of a dormant Commerce Clause challenge to a state statute requires a two-tier analysis. *Brown–Forman Distillers, Corp. v. New York Liquor Auth.*, 476 U.S. 573, 578–79, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The first tier of analysis, referred to as the discrimination tier, is a "virtually *per se* rule of invalidity" and applies "when a state statute clearly discriminates against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). When a statute is clearly discriminatory, the Court will apply strict scrutiny and the statute will be struck down unless the state demonstrates "that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake . . . ." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996) (internal citations omitted.) If the state statute does not "clearly discriminate" but instead "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . ." a less strict scrutiny applies, known as the undue burden tier or the *Pike* balancing tier. *Yamaha Motor Corp. v. Jim's Motorcycle Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174

(1970) (internal quotation marks omitted)). Under a *Pike* analysis, a nondiscriminatory statute with only an incidental effect on commerce "will be upheld unless the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Id.* The Supreme Court has acknowledged that "there is no clear line separating close cases on which scrutiny [or which tier of analysis] should apply." *Wyoming*, 502 U.S. at 455 n.12, 112 S.Ct. 789.

B. Discrimination Tier

Under the discrimination tier, a statute clearly discriminates when it "discriminates facially, in its practical effect, or in its purpose." *Envtl. Tech. Council*, 98 F.3d at 785 (4th Cir. 1996). A statute discriminates in its practical effect when it favors in-state economic interests over out-of-state economic interests, or when it has an extraterritorial reach such that it regulates commerce wholly outside the state's borders. *See Brown-Forman*, 476 U.S. at 579, 106 S.Ct. 2080, *See also Healy v. Beer Inst.* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Baldwin v. G.A.F., Seelig, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 79 L.Ed. 1032 (1935).

Plaintiff mounts its constitutional attack on all fronts. LPI argues that the regulatory scheme is per se unconstitutional because it directly affects interstate commerce. Specifically, LPI maintains that the Act regulates transactions predominately interstate in nature, transactions occurring outside the Commonwealth of Virginia, influences out-of-state

pricing behavior, and subjects market participants to inconsistent regulations. Alternatively, LPI asserts that the Act is unconstitutional under a second or *Pike* tier analysis, in that it imposes undue burdens on interstate commerce, which are not outweighed by its putative local benefits.

Defendants counter that the Act does not violate the dormant Commerce Clause because it regulates evenhandedly with only incidental effects which do not excessively burden interstate commerce. In the alternative, Defendants offer two (2) independent grounds on which this Court could find the Act to be a constitutionally appropriate exercise of power, without reaching the core issue, namely that: (1) Congress has expressly approved state regulation of the viatical settlement industry; and (2) the Act is immunized from a dormant Commerce Clause attack by the McCarran–Ferguson Act ("McCarran–Ferguson"). *See* 15 U.S.C. § 1011 *et seq.* The Court will address these arguments before reaching its dormant Commerce Clause analysis.

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983). However, in order to exempt a state statute from the implied implications of the Commerce Clause, Congress's intention to do so must be " 'unmistakably clear' or 'expressly stated.' " *Envtl. Tech. Council*, 98 F.3d at 782 (4th Cir. 1996) (quoting *South–Central*

Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91–92, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984)).

Defendants argue that Congress specifically authorized states to regulate viatical settlements by enacting Title 26 U.S.C. § 101(g)(2)(B) of the United States Tax Code. This statute provides tax exempt status to proceeds of the sale of an insurance contract sold to a viatical settlement provider if the provider is licensed in the state in which the insured resides, or complies with certain provisions of the Model Regulations or the Model Act. *See* 26 U.S.C. § 101(g)(2)(B).

On careful review, the Court is of the opinion that the statute neither provides express congressional authority to regulate interstate viatical transactions, nor is "unmistakably clear" as to Congress's intent to authorize states to do so. In fact, there is no evidence in the legislative history that Congress ever intended § 101(g) to grant such authority to the states. Rather, the statute only evidences a legislative desire to extend tax benefits to viators. Accordingly, this Court declines to adopt Defendants' overly broad interpretation of the effect of this statute. The Court, however, will not entirely discount the significance of § 101(g). As will be explored in greater detail below, this statute conveys undeniable benefits to viators and plays a role in the Court's dormant Commerce Clause analysis.

With respect to Defendants' argument concerning the applicability of McCarran–Ferguson, it is unnecessary for the Court to reach the merits of this argument given its ul-

timate finding that the Act does not violate the dormant Commerce Clause.

Turning back to the merits of LPI's Commerce Clause challenge, central to the elements of Plaintiff's direct regulation argument is the contention that the viatical settlement agreement in this case was a Texas transaction, placing it beyond the reach of Virginia regulatory laws. Plaintiff's position flows from the language of the Agreement, namely Sections 7.11 and 7.12, and the fact that significant portions of the underlying course of dealings occurred from Plaintiff's Texas headquarters. As further evidence of tenuous Virginia ties, Plaintiff notes that Ms. Doe initially placed her policy with Ideal, a New Jersey based company, through the internet.

The two provisions of the Agreement relied upon by Plaintiff read in pertinent part:

> Section 7.11: This Agreement was entered into in the State of Texas and its validity, construction, interpretation and legal effect shall be governed by the laws and judicial decisions of that state . . . .
>
> Section 7.12: This Agreement is governed by and subject to the rules and regulations relating to viatical settlements as that term is defined under the Texas Insurance Code and regulations promulgated thereunder. The Parties hereby agree that the Texas Department of Insurance has regulatory jurisdiction over this transaction irrespective of the residence of the Seller . . . .

Section 7.11 appears to be a standard choice of law provision. If the terms of the

Agreement were in dispute, or their legal effect uncertain, a reviewing court would look to the law of the State of Texas to resolve the controversy. Furthermore, the parties agreed in Section 7.12 that the Texas Department of Insurance would have regulatory jurisdiction over the transaction irrespective of the residence of the seller. However, this stipulation did not totally divest the Commonwealth of Virginia of regulatory jurisdiction over transactions occurring with its residents within its borders. If the transaction between Ms. Doe and LPI had occurred "wholly outside" the boundaries of the Commonwealth of Virginia, the regulatory scheme at issue may be unconstitutional. *Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). If on the other hand the transaction occurred within the boundaries of the Commonwealth of Virginia, it would be constitutional so long as the regulation furthered legitimate in-state interest. *Id.* at 643–46, 102 S.Ct. 2629. In the immediate case, the agreement formed between LPI and Ms. Doe implicated the regulatory interest of both Texas and Virginia. "Thus, when an offer is made in one state and accepted in another, we now recognize that elements of the transaction have occurred in each state, and that both states have an interest in regulating the terms and performance of the contract." *A.S. Goldmen & Co. v. New Jersey Bureau of SEC*, 163 F.3d 780, 787 (3rd Cir. 1999).

Plaintiff relies on *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), for its contention that the Agreement in this case was the product of a transaction occurring wholly

outside the Commonwealth of Virginia. *Dean Foods* involved a constitutional challenge to Wisconsin's milk pricing regulations. Wisconsin farmers conducted what the court described as preliminary negotiations for the sale of milk with Illinois dairy plants. This included telephone contact and meetings with field representatives. However, the transaction was not complete until Wisconsin farmers transported their product to Illinois plants. The contract was not final until the product had been examined and accepted. The court in *Dean Foods* held that the contract was formed in Illinois and that Wisconsin could not regulate the price of milk sold in Illinois.

The court in *Dean Foods* distinguished the case from *A.S. Goldmen & Co.*:

> There, an offer was made by a securities dealer in New Jersey and accepted by various individuals outside of New Jersey. . . . That stands in marked contrast to the situation here, where we have held that the contract was created and performed wholly in Illinois. This is not a case where 'elements of the transaction have occurred in each state.'

187 F.3d at 620.

LPI also draws the Court's attention to *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925). At issue in *Shafer* was the interstate effect of the North Dakota Grain Grading Act. The act established an elaborate system for grading and regulating wheat earmarked for interstate shipment. The purpose or intent of the act was

to prevent unreasonable margins of profit. 268 U.S. at 200, 45 S.Ct. 481. The Supreme Court struck down the act as violative of the dormant Commerce Clause because it directly affected the price of wheat sold in other states. *Shafer* is distinguishable from the immediate case because here the sale of Ms. Doe's life insurance policy occurred, at least in part, in Virginia. In addition, unlike *Shafer*, the Virginia Act, and accompanying regulation, prescribes identical regulation and pricing for in-state and out-of-state transactions.

A survey of dormant Commerce Clause jurisprudence reveals no widely accepted standard to assess the sufficiency of a state's contacts and interests to justify regulatory measures. Perhaps the most instructive case on this point, decided by the United States Court of Appeals for the Fourth Circuit, is *Underhill Assoc., Inc. v. Bradshaw*, 674 F.2d 293 (4th Cir. 1982). In *Underhill*, a group of discount securities brokers challenged the power of the Commonwealth of Virginia to regulate the activities of non-resident securities brokers under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. In upholding the regulatory scheme, the Fourth Circuit noted "[t]o determine Virginia's power to regulate the activities of nonresidents, we must look to the extent of these nonresidents' contacts with Virginia and to the nature and extent of the state's interest in exercising its authority." *Id.* at 295. The court cited approximately a dozen decisions of the U.S. Supreme Court or other circuits consistent with this conclusion, including *Travelers*

Health Ass'n v. Virginia, 339 U.S. 643, 648, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950), and *Merrick v. N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227, 61 L.Ed. 498 (1917). The court went on to conclude in *Underhill* that "[i]t is not only desirable, but Virginia's interest in protecting its citizens from possibly dishonest or incompetent securities dealers is obvious." *Underhill*, 674 F.2d at 295.

Applying the contacts and interest approach announced in *Underhill* to the immediate case, it is this Court's opinion that the viatical settlement transaction at issue involved sufficient contacts with the Commonwealth of Virginia to warrant compliance with its regulatory scheme if the underlying statute is constitutionally sound. Not only did Ms. Doe reside in Virginia, but it is undisputed that she never left the Commonwealth during the negotiations leading up to this viatical settlement agreement. She placed and received calls in Virginia. She received multiple settlement agreements sent to Virginia for her review, two (2) of which she rejected. Most importantly, she signed the final Agreement in Virginia.

The choice of law provisions contained in the Agreement do not change this result. If this case were a dispute over the terms of the Agreement, Section 7.11 would clearly dictate that the law of Texas would control. Furthermore, if the Agreement had been consummated outside of the Commonwealth of Virginia, Section 7.12 would give the Texas Department of Insurance exclusive regulatory jurisdiction. However, since the transaction touched both Virginia and Texas, it implicated the legisla-

tive interests of both states. *See A.S. Goldmen & Co.*, 163 F.3d at 786–87.

The Court therefore concludes that the viatical settlement agreement in this case was not the product of a purely Texas based transaction as Plaintiff argues. The contacts with Virginia are sufficient to give the Commonwealth regulatory jurisdiction. If the factual basis on which this case is premised involved a viatical settlement agreement negotiated and consummated totally beyond the borders of Virginia, even by a Virginia resident, portions of the Act may well offend the dormant Commerce Clause. That, however, must be left for a later date.

The Court will turn next to the individual parts of Plaintiff's first tier or per se invalidity argument. This facet of Plaintiff's challenge has four (4) components, namely that the Act: 1) regulates transactions predominately interstate in nature; 2) regulates transactions occurring outside the Commonwealth of Virginia; 3) influences out-of-state pricing behavior; and 4) subjects market participants to inconsistent regulation.

For the reasons discussed above, this Court rejects the contention that under the facts of this case, the Act regulates only interstate commerce and is extraterritorially regulating "a Texas contract." Significant parts of this transaction occurred in Virginia, which justified regulatory oversight. The fact that there are no viatical settlement providers with offices in Virginia is inconsequential. Twelve (12) viatical settlement providers are licensed

in Virginia. If a provider chooses to enter the Virginia viatical settlement market and do business with a terminally-ill viator physically located in Virginia, it does not overly burden interstate commerce to require compliance with the Commonwealth's regulatory scheme. Moreover, the Act affects providers situated both within and without the Commonwealth equally.

Relying on the opinions of its experts, LPI contends that Virginia's pricing regulations for viatical agreements unduly influence the marketing of similar agreements in other states. In its experts' view, the higher prices required by the regulations accompanying the Act, skew prices elsewhere and directly affect the interstate market. The experts opine that Virginia's price controls are a barrier to the marketability of policies offered for sale by Virginia residents. Their position is based in part on the fact cited by LPI that over a designated period, 170 policies were sold by Virginia viators, and only three (3) were sold in conformity with the price regulations at issue. LPI argues that it is a reasonable inference that the price controls were evaded, because otherwise, the policies would have been unmarketable. Essentially, Plaintiff contends that the Virginia minimum price controls set a price that is so artificially high that no reasonable viatical settlement company would ever agree to enter into a sale or purchase at those prices. Assuming that LPI's experts are correct, this incidental effect does not necessarily transgress the dormant Commerce Clause.

Contrary to Plaintiff's argument, the Virginia pricing schedule does not discriminate against out-of-state transactions. The pricing regulations affect all markets equally, irrespective of whether the policy is sold in Virginia, Texas or California. By electing to transact business with a client physically located in Virginia, Plaintiff chose to enter a regulated market, fully cognizant of the price restrictions. This is not the case of a product being exported to another state for sale in that jurisdiction. The incidental effect of the intrastate pricing of viatical settlements on the interstate market is no different than the price of any other commodity sold in the Commonwealth, regulated or unregulated.

The opinion advanced by LPI's experts that Virginia pricing regulations are a direct barrier to interstate marketability adds little to Plaintiff's argument. If the pricing schedule chills the interstate market, it has an identical effect on intrastate sales.

The last segment of Plaintiff's first tier challenge involves the alleged effect of inconsistent regulations on interstate commerce. According to Plaintiff, the Act creates irreconcilable conflicts when dealing with providers from other states. Plaintiff argues that the Act violates the dormant Commerce Clause because it subjects out-of-state businesses to inconsistent regulatory regimes. "A state regulation might impose a disproportionate burden on interstate commerce if the regulation is in substantial conflict with a common regulatory scheme in place in other states." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2nd

Cir. 2001) (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 445, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978)). However, "state laws which merely creates additional, but not irreconcilable, obligations are not considered to be 'inconsistent' for this purpose." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826 (3rd Cir. 1994).

Specifically, Plaintiff identifies two (2) conflicts between Virginia and Texas regulations.[2] First, Plaintiff argues that § 38.2–6012(C) of the Act conflicts with Title 28 Texas Administrative Code § 3.1710(c)(8) (2006) because "the Act regulates which state's laws govern contractual disputes between competing viators, irrespective of the contractual agreements executed by the parties." (Pl. Mot. Summ. J. at 17.) Plaintiff asserts that this provision is in direct conflict with Texas law which states "no viatical or life settlement provider . . . shall enter into any viatical or life settlement in which any form used to effect the settlement . . . makes any other state's laws as the law applicable to the form." *Id.* (quoting 28 Tex. Admin. Code § 3.1710(c)(8) (2006)).

The Court is of the opinion that Plaintiff misconstrues § 31710(c)(8) in an attempt to

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[2] This Court has reviewed Plaintiff's Exhibit 9 in support of its conflicting regulation argument. However, Plaintiff highlights no specific inconsistencies other than the two (2) mentioned above, and the Court will not conduct a line by line analysis on its own.

create a conflict where one does not exist. Section 31710(c)(8) states in full:

> [n]o viatical or life settlement provider, provider representative, or broker shall:
>
> enter into any viatical or life settlement **in this state** in which any form used to effect the settlement, including escrow or trust agreement, contains a provision that either requires or limits a viator, life settlor, or owner to resolve a legal dispute with the viatical or life settlement provider, provider representative, or broker in any state other than Texas, specifies a particular city or county, or resolving dispute, or makes any other state's laws as the law applicable to the form (emphasis added).

It is clear from the plain language of the statute that § 31710(c)(8) prohibits a viatical provider or broker from entering into a viatical agreement which contains a choice of law provision, which gives another state regulatory authority over the transaction if the agreement **is entered into in Texas**. As mentioned above, the Agreement in question was not "entered into in Texas" and as a result, there is no actual tension between the laws of Virginia and Texas. As the Second Circuit has advised, "[i]t is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states." *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 112. Accordingly, this Court declines to invalidate a state law based on a hypothetical

conflict or mere speculation that there may be a potential conflict under a different factual setting.

Plaintiff next contends that there is an irreconcilable conflict between the law of the two (2) states because the Virginia Act presumes that a viatical settlement broker is the agent of the viatical settlement provider, unless there is a written agreement between the broker and the viator specifying otherwise. 14 Va. Admin. Code § 5–71–50 (2005). This, LPI claims, is in direct conflict with Texas law which requires a broker to act as a fiduciary to the viator and forbids a broker from being the agent of the provider. 28 Tex. Admin. Code § 3.1711 (2006). Essentially, Plaintiff argues that it is impossible for a viatical settlement broker to comply with both regulations because Texas law requires the broker to be the fiduciary of the viatical settlement provider, while Virginia law requires a broker to be the fiduciary of the viator. The Court is not convinced that this facial inconsistency rises to the level of an irreconcilable conflict. Virginia law does not forbid a broker from acting as an agent for the viator. Rather, it merely requires that the broker first obtain written authorization from the provider before doing so. As a result, a broker can comply with the laws of both states by simply executing a written agreement authorizing it to act as an agent of the viator. The fact that Virginia law has additional requirements does not make it irreconcilable with Texas law. It is merely the cost of doing business, which the Plaintiff assumed when they chose to conduct business in a state other than Texas.

In the final analysis, the Court finds the Virginia Viatical Settlements Act neither discriminates against interstate commerce facially nor in its practical effect. It treats those in-state and out-of-state providers wishing to do business in the Virginia market similarly. Furthermore, there is no tenable basis for Plaintiff's claim that the law was enacted for a discriminatory purpose. It was clearly not intended to protect the economic interests of Virginia-based settlement providers. There are none. Its obvious purpose was to safeguard an asset of some of its most vulnerable citizens, the terminally ill.

The Commonwealth of Virginia has a legitimate interest in protecting the welfare of terminally-ill citizens seeking to liquidate their life insurance policy within its borders. Given the fact that thirty-seven (37) other states have adopted similar versions of the Model Viatical Settlements Act, on which the Virginia statute is based, it appears to be an appropriate exercise of its police powers.

C. Undue Burden Tier

Having determined that the Act does not clearly discriminate facially or in its direct practical effect, the Court must now determine if it violates the second tier of the analysis. This facet of the analysis is governed by balancing the factors articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). *Pike* applies when a state law does not consciously discriminate against interstate commerce, but instead regulates evenhandedly and only indirectly affects inter-

state commerce. *Brown–Forman*, 476 U.S. at 579, 106 S.Ct. 2080. "Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. In applying the *Pike* balancing test, the Court should balance "(1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits." *Star Scientific*, 278 F.3d at 357.

The first task is to determine if the Act has a legitimate local purpose. If the Court finds a legitimate local purpose, "then the question becomes one of degree . . . [a]nd the extent of the burden that will be tolerated will . . . depend on the nature of the local interest, and on whether it could be promoted as well with a lesser impact on interstate activity." *Id.* at 356–57. "In determining whether a statute has a 'legitimate local purpose' and 'putative local benefits,' a court must proceed with deference to the state legislature." *Yamaha Motor Corp.*, 401 F.3d at 569.

The Court finds that the Act has a legitimate and important local purpose, namely, the protection of Virginia viators. It is obvious to the Court that a terminally-ill person with a life expectancy of twenty-four (24) months or less is in a particularly vulnerable position and could easily fall prey to sharp business practices and fraud. The Act's various require-

ments provides the SCC with a regulatory framework which affords Virginia viators with some assurance that the viatical settlement industry will transact business in an honest and ethical fashion. These regulatory burdens impose requirements similar to those governing such other industries as banking, insurance and security dealers. The Act also provides viators with a recourse should the brokers or providers fail to comply with these standards. Finally, when read in tandem with 26 U.S.C. § 101(g)(2)(B) of the Tax code, the Act bestows considerable tax benefits on viators by exempting the proceeds from the sale of their insurance policies from federal income tax.

Plaintiff offers a host of perceived burdens to be weighed against the local benefits of the Act. Plaintiff disputes the defendants' contention that the statute actually protects Virginia viators. Aside from Ms. Doe's complaint, there is no evidence of any other reported cases of alleged fraud or abuse in the Virginia viator settlement industry. Therefore, Plaintiff argues that there is no demonstrated harm which warrants the protection of the Act.

Plaintiff's argument, however, fails to acknowledge the possibility that the Act has been successful in its purported purpose and has deterred unethical or fraudulent activity within the industry. Plaintiff's position also marginalizes the rationale underlying the Model Viatical Settlements Act which has been adopted, at least in part, by over thirty (30) states. Obviously, the legislative bodies of those states uniformly found a sufficient potential for abuse

to warrant protective measures. Ostensibly, the Virginia General Assembly made similar findings. This Court is not "inclined to second guess the impartial judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987). At bottom, this Court must limit its consideration of "whether the legislature had a rational basis for believing there was a legitimate purpose that would be advanced by the statute ... [and] likewise apply a deferential standard in identifying a statute's putative benefits." *Yamaha Motor Corp.*, 401 F.3d at 569 (citing *CTS Corp.*, 481 U.S. at 92–93, 107 S.Ct. 1637).

Relying largely on the opinions of its experts, Plaintiff next counters that the Act, when carefully examined, provides minimal benefits to Virginia viators. Plaintiff contends that the pricing regulations actually disserve Virginia viators by impeding the marketability of their policies. Because the regulation-driven price of Virginia policies exceeds the mean national market price, Virginia policies are not competitive. This "argument [however] relates to the wisdom of the statute, not its burden on commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). If Virginia viators find the price controls to be a barrier to marketing their policies, they should petition the Virginia

General Assembly or the SCC for relief.[3] Finally, it is important to keep in mind that the Virginia pricing policy effects intrastate and interstate sales equally.

Plaintiff further maintains that Ms. Doe derived no significant protection from the Virginia regulatory scheme because the laws of Texas afforded her similar coverage. This may be true in the abstract, but the obvious flaw in Plaintiff's position is the necessity for Ms. Doe, a terminally-ill person, to travel to the State of Texas to avail herself of a Texas forum. Plaintiff further suggests that Virginia's anti-fraud laws provide viators with ample protection from unprincipled practices. The Virginia Viatical Settlements Act is intended to encompass many types of unethical and unfair trade practices which may not amount to fraud. Rather than require an injured viator to cobble together a cause of action from an assortment of legal theories, the Virginia General Assembly chose to address it directly. The benefits of this approach are self-evident.

The last category of burdens which allegedly outweigh the local benefits is the elaborate regulatory scheme required of viatical set-

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[3] The Court also questions the legitimacy of Plaintiff's argument based on the fact that statistics, produced by the Bureau of Insurance, indicate that the number of viatical settlement transactions occurring in Virginia, by parties licensed in accordance with the Act, has steadily increased since 2001. These statistics indicate there is an increasing viatical market in Virginia, despite any incidental effects of the Act on the market.

tlement brokers and providers in Virginia. According to Plaintiff's experts, Virginia's redundant licensing and regulatory requirements, particularly when coupled with price controls, affect both intrastate and interstate viatical transactions, with the primary effect of a disproportionate burden on smaller firms.

The Court first notes that any disproportionate effect the Act has on smaller firms as opposed to larger firms, is irrelevant to dormant Commerce Clause analysis. The Court may not limit its focus to the affect of the Act on one particular type of entity. Rather, the Court must look to the affect of the Act on the entire viatical market. As the Supreme Court advised in *Exxon Corp.*, "the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 128, 98 S.Ct. 2207.

As to the effect of the Act on the intrastate market, Plaintiff's experts contend that the Act affects the intrastate market because "voluntary transactions that would otherwise have taken place are blocked, or must take place outside the state [of Virginia]." There is little doubt that the Act imposes some burden on both intrastate and interstate commerce. However, as mentioned above, the Act burdens both the in-state and out-of-state markets equally. This fact substantially undermines Plaintiff's argument. The Court finds that the incidental burden imposed by the Act on both markets is justified as a legitimate function of the state's police powers. It is clear that "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws

governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent regulate it." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 350, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (internal citations omitted). Furthermore, "[t]he State is entitled to exercise its police power in the manner it sees fit, so long as it is legislating constitutionally." *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1425 (4th Cir. 1985). There can be little doubt that protecting viators from fraud is a local concern which falls within the residuum of the state's police powers. Assuming without deciding that some viators will voluntarily leave the state to do business in order to avoid the regulatory effects of the Act, this is not the type of burden that the dormant Commerce Clause was designed to protect against.

The Court is also of the opinion that the expert's analysis of the effect of the Act on the interstate market is of little value based on the facts before the Court. The experts contend that "if a state like Virginia is permitted to enforce its minimum price control regulation across the national market, the vast majority of Virginia sellers would be shut out of the market." (Pl.'s Ex. 6 ¶ 30.) However, contrary to the experts' conclusion, Ms. Doe's transaction is not a situation in which Virginia is enforcing the provisions of the Act "across the national market place." As discussed above, this is a transaction which occurred at least in part in the Commonwealth of Virginia. If Virginia was in fact enforcing the Act across the national market place, this alleged burden may

be more significant to the Court's analysis. However, this is not the case and the Court will not invalidate a state statute based on facts which are not before it.

As a result, this Court finds that the Act effectuates a legitimate local public interest and that its effects on interstate commerce are only incidental. Therefore, the Act must "be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. The Court further finds that the burdens imposed by the Act are not "clearly excessive" when compared with the legitimate and important purpose behind the Act. The Court is also of the opinion that nothing short of Virginia's comprehensive regulatory scheme, which couples licensing and registration with price controls, could provide a level playing field for its physically infirm citizens financially constrained to liquidate their life insurance policy. The Virginia Viatical Settlements Act is far from a vagrant protectionist whim. It parallels legislation enacted in over thirty (30) other states with a common origin, the Model Viatical Settlements Act. Thus, the Court concludes that the legitimate purpose of the Act cannot be achieved with a lesser impact on interstate commerce.

V. Conclusion

The Court finds that the Virginia Viatical Settlements Act does not violate the Commerce Clause of the United States Constitution and, therefore, Plaintiff's Motion for Summary Judgment will be denied. Defendants' and In-

tervenor's Motions for Summary Judgment will be granted.

An appropriate Order will accompany this Memorandum Opinion.

ORDER

(Denying Plaintiff's Motion for Summary Judgment and Granting the Motions for Summary Judgment Filed by the Defendants and the Intervenor)

THIS MATTER is before the Court on cross-Motions for Summary Judgment. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion for Summary Judgment is DENIED. Defendants' and Intervenor's Motions for Summary Judgment are GRANTED.

The Clerk is directed to send a copy of this Order to all counsel of record.

It is SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 29, 2007

No. 06-1370
3:05-cv-00368-HEH

LIFE PARTNERS, INCORPORATED

Plaintiff - Appellant

v.

THEODORE V. MORRISON, JR.; MARK C. CHRISTIE, in their official capacities as Commissioner of the State Corporation Commission; ALFRED W. GROSS, in his official capacity as the Commissioner of Insurance; JUDITH WILLIAMS JAGDMANN, in her official capacity as Commissioner of the State Corporation Commission

Defendants – Appellees

ROBERT F. MCDONNELL, in his official capacity as the Attorney General of the Commonwealth of Virginia

Intervenor – Appellee

and

CLINTON MILLER, in official capacity as Commissioner of the State Corporation Commission

Defendant

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS; NORTH AMERICA SECURITIES ADMINISTRATORS ASSOCIATION, INCORPORATED

Amici Supporting Appellees

and

VIATICAL SETTLEMENT PROFESSIONALS, INCORPORATED

Movant

No. 06-1371
3:05-cv-00368-HEH

LIFE PARTNERS, INCORPORATED

Plaintiff – Appellee

v.

THEODORE V. MORRISON, JR.; MARK C. CHRISTIE, in their official capacities as Commissioner of the State Corporation Commission; ALFRED W. GROSS, in his official capacity as the Commissioner of Insurance; JUDITH WILLIAMS JAGDMANN, in her official capacity as Commissioner of the State Corporation Commission

Defendants – Appellants

and

CLINTON MILLER, in official capacity as Commissioner of the State Corporation Commission

Defendant

and

ROBERT F. MCDONNELL, in his official capacity as the Attorney General of the Commonwealth of Virginia

Intervenor – Defendant

NORTH AMERICA SECURITIES ADMINISTRATORS ASSOCIATION, INCORPORATED; NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

Amici Supporting Appellants

and

VIATICAL SETTLEMENT PROFESSIONALS, INCORPORATED

Movant

On Petition for Rehearing En Banc

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Michael, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

CODE OF VIRGINIA

CHAPTER 60

VIATICAL SETTLEMENTS ACT.

§ 38.2-6000. Definitions.

As used in this chapter:

"*Advertising*" means any written, electronic, or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the Internet, or similar communications media, including film strips, motion pictures, and videos published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of creating an interest in or inducing a person to sell a life insurance policy pursuant to a viatical settlement contract.

"*Business of viatical settlements*" means an activity involved in, but not limited to, the offering, solicitation, negotiation, procurement, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, or hypothecating in any other manner, of viatical settlement contracts or purchase agreements.

"*Chronically ill*" means (i) being unable to perform at least two activities of daily living, which shall include eating, toileting, transferring, bathing, dressing or continence, (ii) re-

quiring substantial supervision by another person to protect the individual from threats to health and safety due to severe cognitive impairment, or (iii) having a level of disability similar to that described in clause (i) as determined by the federal Secretary of Health and Human Resources.

"*Financing entity*" means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies and who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts. Financing entity does not include a non-accredited investor or viatical settlement purchaser.

"*Fraudulent viatical settlement act*" includes:

1. Acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits or permits its employees or its agents to engage in acts including:

a. Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer,

insurance producer, or any other person, false material information, or concealing material information, as part of, in support of, or concerning a fact material to one or more of the following: (i) an application for the issuance of a viatical settlement contract or insurance policy; (ii) the underwriting of a viatical settlement contract or insurance policy; (iii) a claim for payment or benefit pursuant to a viatical settlement contract or insurance policy; (iv) premiums paid on an insurance policy; (v) payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract, or insurance policy; (vi) the reinstatement or conversion of an insurance policy; (vii) in the solicitation, offer, effectuation or sale of a viatical settlement contract or insurance policy; (viii) the issuance of written evidence of a viatical settlement contract or insurance policy; or (ix) a financing transaction;

b. Employing any device, scheme, or artifice to defraud related to viaticated policies;

2. In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to: (i) remove, conceal, alter, destroy, or sequester from the Commission the assets or records of a licensee or other person engaged in the business of viatical settlements; (ii) misrepresent or conceal the financial condition of a licensee, financing entity, insurer, or other person; (iii) transact the business of viatical settlements in violation of laws requiring a license, certificate of authority, or other legal authority for the transaction of the business of viatical settle-

ments; or (iv) file with the Commission or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise conceals information about a material fact from the Commission;

3. Embezzlement, theft, misappropriation or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or any other person engaged in the business of viatical settlements or insurance;

4. Recklessly entering into, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. "Recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; or

5. Attempting to commit, assisting, aiding or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

"*Licensee under this chapter*" means a person licensed by the Commission as a viatical settlement provider or viatical settlement broker.

"*NAIC*" means National Association of Insurance Commissioners.

"*Policy*" means an individual or group policy, group certificate, contract or arrangement of life insurance affecting the rights of a resident of this Commonwealth or bearing a reasonable relation to this Commonwealth, regardless of whether delivered or issued for delivery in this Commonwealth.

"*Related provider trust*" means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust shall have a written agreement with the licensed viatical settlement provider under which the licensed viatical settlement provider is responsible for ensuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files related to viatical settlement transactions available to the Commission as if those records and files were maintained directly by the licensed viatical settlement provider.

"*Special purpose entity*" means a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide either directly or indirectly access to institutional capital markets for a financing entity or licensed viatical settlement provider.

"*Terminally ill*" means having an illness or sickness that can reasonably be expected to result in death in 24 months or less.

"*Viatical settlement broker*" means a person that on behalf of another and for a fee, commission or other valuable consideration introduces viators to viatical settlement providers, or offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers. A viatical settlement broker may act as agent for a viatical settlement provider or on behalf of the viator, provided that a viatical settlement broker shall not be deemed to act exclusively for the viator unless, pursuant to written agreement between the parties, the broker agrees (i) to disclose fully all interests in the viatical settlement contract and relationships with the viatical settlement provider, including its affiliates and appointed or contracted agents, and (ii) that compensation for services as a viatical settlement broker shall be paid directly and only by the viator. The term does not include an attorney, certified public accountant, or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or viatical settlement purchaser.

"*Viatical settlement contract*" means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.

A viatical settlement contract also includes a contract for a loan or other financing transaction with a viator secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy. A viatical settlement contract includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date regardless of the date that compensation is paid to the viator. "Viatical settlement contracts" do not include accelerated benefits provisions contained in life insurance policies, whether issued with the original policy or as a rider, according to the regulations promulgated by the Commission.

"*Viatical settlement provider*" means a person, other than a viator, that enters into or effectuates a viatical settlement contract. Viatical settlement provider does not include: (i) a bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan; (ii) the issuer of a life insurance policy providing accelerated benefits under § 38.2-3115.1 and pursuant to the contract; (iii) an authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, viatical settlement purchaser, financing entity, special purpose entity or related provider trust; (iv) a natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(v) a financing entity; (vi) a special purpose entity; (vii) a related provider trust; (viii) a viatical settlement purchaser; or (ix) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, and who purchases a viaticated policy from a viatical settlement provider and does not communicate with the viator or insured who is a resident of this Commonwealth except through a licensee under this chapter.

"*Viatical settlement purchaser*" means a person who gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy, or a person who owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. Viatical settlement purchaser does not include (i) a licensee under this chapter; (ii) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended; (iii) a financing entity; (iv) a special purpose entity; or (v) a related provider trust.

"*Viaticated policy*" means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.

"*Viator*" means the owner of a life insurance policy or a certificate holder under a group policy who enters or seeks to enter into a viatical settlement contract. For the purposes of this chapter and the application of Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title, a viator shall not be limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness except where specifically addressed. Viator does not include (i) a licensee under this chapter; (ii) an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended; (iii) a financing entity; (iv) a special purpose entity; or (v) a related provider trust.

§ 38.2-6001. Viatical settlement brokers.

No person shall act as a viatical settlement broker with a resident of this Commonwealth without first obtaining a license from the Commission in accordance with Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. If there is more than one viator on a single policy, and the viators are residents of different states, the viatical settlement broker shall be required to hold a license in the state in which the viator having the largest percentage resides or, if the viators hold equal ownership, the viatical settlement broker shall be required to hold a license in the state of residence of one viator agreed upon in writing by all the viators.

§ 38.2-6002. Viatical settlement providers, license requirements.

A. No person shall act as a viatical settlement provider with a resident of this Commonwealth without first obtaining a license from the Commission.

1. A person seeking to be licensed as a viatical settlement provider in this Commonwealth shall apply for such license in a form acceptable to the Commission and shall pay to the Commission a nonrefundable application fee in an amount prescribed by the Commission. On and after July 1, 2003, such fee shall be not less than $300 and not more than $1,500. The application fee required by this subdivision shall be collected by the Commission, paid directly into the state treasury, and credited to the "Bureau of Insurance Special Fund—State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

2. A license issued anytime prior to July 1, 2004, shall expire on June 30, 2004, unless renewed as set forth herein.

3. On or before March 1 of each year commencing March 1, 2004, a licensed viatical settlement provider shall remit a renewal application form and nonrefundable renewal fee in the form and amount prescribed by the Commission. Such fee shall be not less than $300 and not more than $1,500. The renewal fee required by this subdivision shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund—State Corporation

Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

4. A viatical settlement provider's license expiring on June 30 may be renewed on July 1 for a one-year period ending on June 30 of the following year if the required renewal application and a nonrefundable renewal fee have been received and the license is not terminated, suspended, or revoked at the time of renewal. The renewal fee required by this subdivision shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund—State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

B. The applicant shall provide information on forms required by the Commission. The Commission shall have authority, at any time, to require the applicant to disclose fully the identity of all stockholders, partners, officers, members, and employees, and the Commission may, in the exercise of the Commission's discretion, refuse to issue a license in the name of a legal entity if not satisfied that any officer, employee, stockholder, partner, or member thereof who may materially influence the applicant's conduct meets the standards of this chapter.

C. A license issued to a legal entity authorizes all partners, officers, members, and designated employees to act as the viatical settlement provider under the license, and all those per-

sons shall be named in the application and any application supplements.

D. Upon the filing of an application and the payment of the nonrefundable application fee, the Commission shall make such investigation of each applicant as the Commission may determine to be appropriate and issue a license if it finds that the applicant: (i) has provided a detailed plan of operation; (ii) is competent and trustworthy; (iii) indicates its intention to act in good faith within the confines of the license; (iv) has a good business reputation; (v) if an individual, has had experience, training or education that qualifies him for licensure; (vi) if a resident partnership, limited liability company, or corporation, has recorded the existence of the partnership, limited liability company, or corporation pursuant to law; (vii) if a corporation, has specific authority to act as a viatical settlement provider in its charter; (viii) if a nonresident partnership, limited liability company, or corporation, has furnished proof of its authority to transact business in Virginia; and (ix) has provided an anti-fraud plan that meets the requirements of subdivision E 2 of § 38.2-6011.

E. If the applicant for a viatical settlement provider license is a nonresident, such applicant, as a condition precedent to receiving or holding a license, shall designate a resident of this Commonwealth as the person upon whom any process, notices, or order required or permitted by law to be served upon such nonresident viatical settlement provider may be served; and such licensee shall promptly notify the clerk of the Commission in writing of every

change in its designated agent for service of process, and such change shall not become effective until acknowledged by the Commission. Whenever a nonresident viatical settlement provider transacting business in this Commonwealth fails to appoint or maintain a registered agent in this Commonwealth, or whenever its registered agent cannot with reasonable diligence be found at the registered office, the clerk of the Commission shall be an agent of the nonresident upon whom service may be made in accordance with § 12.1-19.1.

F. A licensed insurer shall be prohibited from transacting the business of a viatical settlement provider.

G. The Commission may suspend, revoke, refuse to issue, or refuse to renew the license of a viatical settlement provider if the Commission finds that the applicant or licensee has (i) made any material misrepresentation in the application; (ii) been guilty of fraudulent or dishonest practices; (iii) been subject to a final administrative action or has otherwise been shown to be untrustworthy or incompetent to act as a viatical settlement provider; (iv) demonstrated a pattern of unreasonable payments to viators; (v) been convicted of a felony or any misdemeanor involving fraud or moral turpitude; (vi) entered into any viatical settlement contract that has not been approved pursuant to this chapter; (vii) failed to honor contractual obligations set out in a viatical settlement contract; (viii) demonstrated or represented that it no longer meets the requirements for initial licensure; (ix) has assigned, transferred, or pledged a viaticated policy to a person other

than a viatical settlement provider licensed in this Commonwealth, viatical settlement purchaser, an accredited investor, or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, financing entity, special purpose entity, or related provider trust; (x) violated any provisions of this chapter or other applicable provisions of this title or has in its employ or organization any officer, partner, member, or key management personnel who has violated any provision of this chapter or other applicable provisions of this title; or (xi) has renewed or requested renewal of its license before implementing the anti-fraud initiatives required by subsection E of § 38.2-6011.

H. No applicant to whom a license is refused after a hearing, nor any licensee whose license is revoked, shall apply again for a license under this chapter until after the expiration of a period of five years from the date of the Commission's order, or such other period of time as the Commission prescribes in its order.

I. A viatical settlement provider shall be bonded as required by the Commission. Rules issued pursuant to § 38.2-6014 may identify other mechanisms for financial accountability.

§ 38.2-6003. Approval of viatical settlement contracts and disclosure statements.

A. A person shall not use a viatical settlement contract or provide to a viator a disclosure statement form in this Commonwealth unless filed with and approved by the Commission in accordance with procedures set forth in § 38.2-

316. In the absence of more specific regulation or rules promulgated by the Commission for the business of viatical settlements, standards and requirements of general application set forth in § 38.2-316 and rules promulgated thereunder shall be deemed applicable to viatical settlement contracts and disclosure statement forms, required by this chapter.

B. At the Commission's discretion, the Commission may require the submission of advertising material used or intended for use in this Commonwealth.

§ 38.2-6004. Reporting requirements.

A. Each licensee under this chapter shall file with the Commission on or before March 1 of each year the certification required by subsection E of § 38.2-6011 and an annual report containing such information as the Commission may prescribe by rule or regulation; however, such information shall be limited to only those transactions where the viator is a resident of this Commonwealth.

B. A viatical settlement provider shall report in writing to the Commission the following:

1. New or revised information about its officers, stockholders owning 10 percent or greater interest in the licensee or an affiliate of the licensee, partners, directors, members, or designated employees within 30 calendar days of the change;

2. Any change in business or residence address or name within 30 calendar days of the change.

C. A licensed viatical settlement provider convicted of a felony shall report within 30 calen-

dar days to the Commission the facts and circumstances regarding the criminal conviction.

§ 38.2-6005. Privacy.

Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, insurance company, insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall not disclose that identity as an insured, or the insured's financial or medical information to any other person unless the disclosure:

1. Is necessary to effect a viatical settlement between the viator and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

2. Is provided in response to an investigation or examination by the Commission or another governmental agency or officer or pursuant to the requirements of subsection C of § 38.2-6011;

3. Is a term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;

4. Is necessary to permit a financing entity, related provider trust, or special purpose entity to finance the purchase of policies by a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

5. Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts

for the purpose of determining health status; or

6. Is required to purchase stop loss coverage.

§ 38.2-6006. Examinations; record retention; investigations.

A. Viatical settlement providers, viatical settlement brokers, and persons seeking a license under this title to transact the business of viatical settlements in this Commonwealth shall be subject to examination by the Commission pursuant to Article 4 (§ 38.2-1317 *et seq.*) of Chapter 13 of this title. For purposes of completing such examination, the Commission may examine or investigate any person, or the business of any person, insofar as the examination or investigation is, in the sole discretion of the Commission, necessary or material to the examination of a licensee.

B. A person required to be licensed by this chapter shall for five years retain copies of (i) all proposed, offered or executed contracts, purchase agreements, underwriting documents, policy forms, and applications from the date of the proposal, offer or execution of the contract or purchase agreement, whichever is later; (ii) all checks, drafts or other evidence and documentation related to the payment, transfer, deposit, or release of funds from the date of the transaction; and (iii) all other records and documents related to the requirements of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. This section does not relieve a person of the obligation to produce these documents to the Commission after the retention period has expired if the person has

retained the documents. Records required to be retained by this section must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record.

C. The Commission may investigate suspected fraudulent viatical settlement acts and persons engaged or alleged to be engaged in the business of viatical settlements.

§ 38.2-6007. Disclosure.

A. Before asking a viator or insured to sign any document, a licensee under this chapter shall provide the respective viator or insured, or both, with a copy of the disclosure document described in this subsection. The viatical settlement provider or viatical settlement broker shall provide the viator with an additional copy of the disclosures, with the application, no later than the time the application for the viatical settlement contract is signed by all parties. The disclosures shall be provided in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

1. There are possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy.

2. Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes,

and assistance should be sought from a professional tax advisor.

3. Proceeds of the viatical settlement could be subject to the claims of creditors.

4. Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for Medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies.

5. The viator has the right to rescind a viatical settlement contract for 15 calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in subsection C of § 38.2-6008. If the insured dies during the rescission period, the settlement contract shall be deemed to have been rescinded, subject to repayment of all viatical settlement proceeds and any premiums, loans, and loan interest to the viatical settlement provider or viatical settlement purchaser.

6. Funds will be sent to the viator within three business days after the viatical settlement provider has received the insurer's or group administrator's acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated.

7. Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate, to be forfeited by the viator. Assistance should be sought from a financial adviser.

8. Disclosure to a viator shall include distribution of a brochure describing the process of vi-

atical settlements. The NAIC's form for the brochure shall be used unless one is developed by the Commission.

9. The disclosure document shall contain the following language: "All medical, financial, or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse, or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years."

10. The insured may be contacted by either the viatical settlement provider or broker or its authorized representative for the purpose of determining the insured's health status. This contact is limited to once every three months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less.

B. A viatical settlement provider shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and the vi-

atical settlement provider or viatical settlement broker, and provide the following information:

1. The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated;

2. The name, address, and telephone number of the viatical settlement provider;

3. The dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate. If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate, and the viatical settlement provider's interest in those benefits;

4. State the name, business address, and telephone number of the independent third party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents; and

5. If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with his insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement.

C. If the provider transfers ownership or changes the beneficiary of the insurance policy,

the provider shall communicate the change in ownership or beneficiary to the insured within 20 days after the change.

§ 38.2-6008. General rules.

A. A viatical settlement provider entering into a viatical settlement contract shall:

1. First obtain:

a. If the viator is the insured, a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract; and

b. A document in which the insured consents to the release of his medical records to a viatical settlement provider, viatical settlement broker, and the insurance company that issued the life insurance policy covering the life of the insured. The consent for the release of medical records shall only be obtained for the insurance company if the life insurance policy covering the insured was issued within 48 months of the date of the viator's application for the viatical settlement contract.

2. Within 20 days after a viator executes documents necessary to transfer any rights under an insurance policy or within 20 days of entering any agreement, option, promise or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy. The notice shall be accompanied by the documents required by subdivision 3.

3. The viatical settlement provider shall deliver a copy of the medical release required under subdivision 1 b of this subsection, a copy of the viator's application for the viatical settlement contract, the notice required under subdivision 2, and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction. The verification form adopted by the NAIC shall be used unless standards for verification are developed by the Commission.

4. The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider not later than 30 calendar days after the date the request is received. The insurer shall complete and issue the verification of coverage to the viatical settlement provider or, in its response, the insurer shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation regarding possible fraud or the validity of the insurance contract.

5. Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that the viator has a full and complete understanding of the viatical settlement contract, that he has a full and complete understanding of the benefits of the life insurance policy, acknowledges that he is entering into the viatical settlement contract freely and voluntarily and, for persons who are chronically or terminally ill, acknowledges that the insured has a terminal or

chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy was issued.

6. If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of this section.

B. All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to privacy or confidentiality of medical information.

C. All viatical settlement contracts entered into in this Commonwealth shall provide the viator with an unconditional right to rescind the contract for at least 15 calendar days from the receipt of the viatical settlement proceeds. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans, and loan interest that have been paid by the viatical settlement provider or purchaser.

D. The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment or change in beneficiary directly to the independent escrow agent. Within three business days after the date the escrow agent receives the documents, or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider, the

provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation. Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment, or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment, or designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.

E. Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to subdivision A 6 of § 38.2-6007 renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

F. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker after the viatical settlement has occurred shall only be made by the viatical settlement provider or broker licensed in this Commonwealth or its authorized representatives and shall be limited to once every three months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider or broker shall explain the procedure for these contacts

at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers and viatical settlement brokers shall be responsible for the actions of their authorized representatives.

§ 38.2-6009. Prohibited practices.

A. It is a violation of this chapter for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:

1. The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least 24 months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

2. The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the two-year period:

a. The insured is terminally or chronically ill, or

b. The viator or insured disposes of his ownership interests in a closely held corporation

pursuant to terms of a buyout or other similar agreement in effect at the time the insurance policy was initially issued.

B. Copies of the certifications and independent evidence required by this subsection and documents required by subsection A of § 38.2-6008 shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

§ 38.2-6010. Advertising for viatical settlements.

A. This section shall apply to any advertising of viatical settlement contracts, or related products or services intended for dissemination in this Commonwealth, including Internet advertising viewed by persons located in this Commonwealth. Where disclosure requirements are established pursuant to federal regulation, this section shall be interpreted so as to minimize or eliminate conflict with federal regulation wherever possible.

B. Each licensee under this chapter shall establish and at all times maintain a system of control over the content, form and method of dissemination of all advertisements of its contracts, products, and services. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the licensee, as well as the individual who created or presented the advertisement. A

system of control shall include regular routine notification, at least once a year, to agents and others authorized by the licensee who disseminates advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the licensee.

C. Advertisements shall be truthful and not misleading in fact or by implication. The form and content of an advertisement of a viatical settlement contract shall be sufficiently complete and clear so as to avoid deception. It shall not have the capacity or tendency to mislead or deceive. Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the Commission from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

D. The information required to be disclosed under this section shall not be minimized, rendered obscure, or presented in an ambiguous fashion or intermingled with the text of the advertisement so as to be confusing or misleading.

1. An advertisement shall not omit material information or use words, phrases, statements, references, or illustrations if the omission or use has the capacity, tendency, or effect of misleading or deceiving viators, as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax consequence. The fact that the viatical settlement contract offered is made available for inspection prior to

consummation of the sale, or an offer is made to refund the payment if the viator is not satisfied or that the viatical settlement contract includes a "free look" period that satisfies or exceeds legal requirements, does not remedy misleading statements.

2. An advertisement shall not use the name or title of a life insurance company or a life insurance policy unless the advertisement has been approved by the insurer.

3. An advertisement shall not state or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or in any manner an incorrect or improper practice.

4. The words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or words of similar import shall not be used with respect to any benefit or service unless true. An advertisement may specify the charge for a benefit or a service or may state that a charge is included in the payment or use other appropriate language.

5. Testimonials, appraisals, or analysis used in advertisements must be genuine; represent the current opinion of the author; be applicable to the viatical settlement contract, product, or service advertised, if any; and be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisal, analysis, or endorsement. In using testimonials, appraisals, or analysis, the viatical settlement licensee makes as its own all the statements contained therein, and the

statements are subject to all the provisions of this section.

a. If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the viatical settlement provider, viatical settlement broker, or related entity as a stockholder, director, officer, employee, or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.

b. An advertisement shall not state or imply that a viatical settlement contract benefit or service has been approved or endorsed by a group of individuals, society, association, or other organization unless that is the fact and unless any relationship between an organization and the viatical settlement licensee is disclosed. If the entity making the endorsement or testimonial is owned, controlled, or managed by the viatical settlement licensee, or receives any payment or other consideration from the viatical settlement licensee for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.

c. When an endorsement refers to benefits received under a viatical settlement contract all pertinent information shall be retained for a period of five years after its use.

E. An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts. The source of all statistics used in an advertisement shall be identified.

F. An advertisement shall not disparage insurers, viatical settlement providers, viatical settlement brokers, viatical settlement investment agents, insurance producers, policies, services, or methods of marketing.

G. The name of the viatical settlement licensee shall be clearly identified in all advertisements about the licensee or its viatical settlement contracts, products, or services, and if any specific viatical settlement contract is advertised, the viatical settlement contract shall be identified either by form number or some other appropriate description. If an application is part of the advertisement, the name of the viatical settlement provider shall be shown on the application.

H. An advertisement shall not use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark, slogan, symbol, or other device or reference without disclosing the name of the viatical settlement licensee, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee, or to create the impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract.

I. An advertisement shall not use any combination of words, symbols, or physical materials that by their content, phraseology, shape, color, or other characteristics are so similar to

a combination of words, symbols, or physical materials used by a government program or agency or otherwise appear to be of such a nature that they tend to mislead prospective viators into believing that the solicitation is in some manner connected with a government program or agency.

J. An advertisement may state that a viatical settlement licensee is licensed in the state where the advertisement appears, provided it does not exaggerate that fact or suggest or imply that a competing viatical settlement licensee may not be so licensed. The advertisement may ask the audience to consult the licensee's website or contact the Bureau of Insurance to find out if this Commonwealth requires licensing and, if so, whether the viatical settlement provider or viatical settlement broker is licensed.

K. An advertisement shall not create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims or the merits, desirability, or advisability of its viatical settlement contracts are recommended or endorsed by any government entity.

L. The name of the actual licensee shall be stated in all of its advertisements. An advertisement shall not use a trade name, any group designation, name of any affiliate, or controlling entity of the licensee, service mark, slogan, symbol, or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual licensee or create the false impression that an

affiliate or controlling entity would have any responsibility for the financial obligation of the licensee.

M. An advertisement shall not directly or indirectly create the impression that any division or agency of the state or of the U.S. government endorses, approves, or favors:

1. Any viatical settlement licensee or its business practices or methods of operation;

2. The merits, desirability, or advisability of any viatical settlement contract;

3. Any viatical settlement contract; or

4. Any life insurance policy or life insurance company.

N. If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator.

O. If the advertising emphasizes the dollar amounts available to viators, the advertising shall disclose the average purchase price as a percent of face value obtained by viators contracting with the licensee during the past six months.

§ 38.2-6011. Fraud prevention and control.

A. A person shall not commit a fraudulent viatical settlement act. A person shall not knowingly or intentionally interfere with the enforcement of the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title or investigations of suspected or actual violations of this chapter or Article 6.1

(§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title. A person in the business of viatical settlements shall not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

B. Viatical settlement contracts and applications for viatical settlements, regardless of the form of transmission, shall contain the following statement or a substantially similar statement: "Any person who knowingly presents false information in an application for insurance or viatical settlement contract may be guilty of a crime and subject to prosecution." The lack of the required statement does not constitute a defense in any prosecution for a fraudulent viatical settlement act.

C. Any person engaged in the business of viatical settlements having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed shall provide to the Commission the information required by, and in a manner prescribed by, the Commission. Any other person having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed may provide to the Commission the information required by, and in a manner prescribed by, the Commission.

D. This chapter shall not:

1. Preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine, and prosecute suspected violations of law;

2. Prevent or prohibit a person from disclosing voluntarily information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

3. Limit the powers granted elsewhere by the laws of this Commonwealth to the Commission or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

E. A licensee under this chapter shall within 60 days of licensure and annually thereafter by March 1 of each year certify to the Commission implementation of anti-fraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts. Anti-fraud initiatives shall include:

1. Fraud investigators, who may be viatical settlement providers or viatical settlement broker employees or independent contractors; and

2. An anti-fraud plan, which shall include, but not be limited to:

a. A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;

b. A description of the procedures for reporting possible fraudulent viatical settlement acts to the Commission;

c. A description of the plan for anti-fraud education and training of underwriters and other personnel; and

d. A description or chart outlining the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications.

F. Anti-fraud plans submitted to or obtained by the Commission and in the control or possession of the Commission shall be privileged and confidential, shall not be subject to inspection or review by the general public, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil or criminal action. However, the Commission is authorized to use the anti-fraud plans in the furtherance of any regulatory or legal action brought as a part of the Commission's duties.

§ 38.2-6012. Civil remedies.

A. Any person damaged by the acts of a person in violation of this chapter may bring a civil action against the person committing the violation in a court of competent jurisdiction.

B. The Commission shall have no jurisdiction to adjudicate controversies between licensees, or between a licensee under this chapter and a viator or an insured.

C. If there is more than one viator on a single policy and the viators are residents of different states, contractual disputes arising from the viatical settlement shall be governed by the law of the state in which the viator having the largest percentage ownership resides or, if the viators hold equal ownership, the state of resi-

dence of one viator agreed upon in writing by all viators, provided that the application of another state's laws shall not impair or limit the ability of the Commission to apply and enforce the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title in its regulation of transactions with a resident of this Commonwealth.

§ 38.2-6013. Unfair trade practices.

A violation of this chapter shall be considered an unfair trade practice under Chapter 5 (§ 38.2-500 *et seq.*) of this title and subject to the penalties contained in that chapter.

§ 38.2-6014. Commission authority.

Pursuant to the authority granted by § 38.2-223, the Commission may promulgate such rules and regulations as it may deem necessary to implement this chapter, including, but not limited to:

1. Establishing standards for evaluating reasonableness of payments under viatical settlement contracts for insureds who are terminally or chronically ill. This authority includes, but is not limited to, regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise, or bequest of a benefit under a life insurance policy. Viatical settlement providers, where the insured is not terminally ill or chronically ill, shall pay an amount greater than the cash surrender value or accelerated death benefit then available;

2. Establish appropriate licensing requirements, fees, and standards for continued licen-

sure for viatical settlement providers and viatical settlement brokers;

3. Requiring and setting the amount of any bond or other mechanism for financial accountability for viatical settlement providers and viatical settlement brokers; and

4. Adopting rules governing the relationship and responsibilities of both insurers and viatical settlement providers and viatical settlement brokers during the viatication of a life insurance policy or certificate.

§ 38.2-6015. Immunity from liability.

A. No cause of action shall arise nor shall any liability be imposed against the Commission, the Commissioner of Insurance, or any of the Commission's employees or agents, for any statements made or conduct performed in good faith while carrying out the provisions of this chapter or Article 6.1 (§ 38.2-1865.1 *et seq.*) of Chapter 18 of this title.

B. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the Commission, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

C. No civil liability shall be imposed on and no cause of action shall arise from a person's furnishing information concerning suspected, anticipated, or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

1. The Commission, the Commissioner of Insurance, or any of the Commission's employees or agents;

2. Federal, state, or local law enforcement or regulatory officials or their employees, agents or representatives;

3. A person involved in the prevention and detection of fraudulent viatical settlement acts or that person's agents, employees, or representatives;

4. The NAIC, National Association of Securities Dealers, the North American Securities Administrators Association, or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities, or investment fraud;

5. The life insurer that issued the life insurance policy covering the life of the insured; or

6. Any licensee under this chapter, provided the information furnished shall not be utilized as grounds to excuse the direct actions of such licensee.

D. Immunity provided by subsection C shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act or a fraudulent insurance act, the party bringing the action shall plead specifically any allegation that subsection C does not apply because the person filing the report or furnishing the information did so with actual malice.

E. This section does not abrogate or modify common law or statutory privileges or immuni-

ties enjoyed by a person described in subsections A or C.

F. The documents and evidence provided pursuant to this section or obtained by the Commission in an investigation of suspected or actual fraudulent viatical settlement acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a private civil or criminal action.

G. Subsection F does not prohibit release by the Commission of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:

1. In administrative or judicial proceedings to enforce laws administered by the Commission;

2. To federal, state, or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts or to the NAIC; or

3. At the discretion of the Commission, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.

H. Release of documents and evidence under subsection G does not abrogate or modify the privilege granted in subsection F.

§ 38.2-6016. Applicability of securities laws.

Nothing in this chapter shall preempt or otherwise limit the provisions of the Virginia Securities Act (§ 13.1-501 *et seq.*), or any regulations, notices, bulletins or other interpretations issued by or through the Commission act-

ing pursuant to the Virginia Securities Act. Compliance with the provisions of this chapter shall not constitute compliance with any applicable provision of the Virginia Securities Act and any amendments thereto or any regulations, notices, bulletins, or other interpretations issued by or through the Commission acting pursuant to the Virginia Securities Act.